TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1954

No. 6

B. CLINTON WATSON, ET UX., PETITIONERS,

vs.

EMPLOYERS LIABILITY ASSURANCE CORPORATION, LTD., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 31, 1955
CERTIORARI GRANTED MAY 2, 1955

SUPREME COURT OF THE UNITED STATES

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INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 28, 1954.

—5324

[fol. a-1] [Caption omitted]

[fol. 2]

IN THE SECOND JUDICIAL DISTRICT COURT FOR THE PARISH OF BIENVILLE, STATE OF LOUISIANA

ORIGINAL PETITION

To the Honorable Judges of the Second Judicial District Court in and for the Parish of Bienville, State of Louisiana:

The petition of B. Clinton Watson and of Mrs. Ruth S. Watson, both of the full age of majority and residents of Bienville Parish, Louisiana, with respect, represents:

1

That petitioners are husband and wife respectively;

2

That Employers Liability Assurance Corporation, Ltd., is a foreign insurance corporation authorized to do and actually doing business in the State of Louisiana;

3

That said Employers Liability Assurance Corporation, Ltd., made defendant herein, is justly and truly indebted unto petitioner, Mrs. Ruth S. Watson, in the full sum of Fifty Thousand and no/100 ($50,000.00) Dollars, and unto petitioner, B. Clinton Watson, in the full sum of Twenty-Five Thousand Eight Hundred Twenty-Seven and 42/100 ($25,827.42) Dollars;

4

That said amounts are due unto petitioners by said defendant for damages as will be particularized hereinafter arising out of the use of a product known as "Toni Home Permanent" and the injury to petitioner, Mrs. Ruth S. [fol. 3] Watson, thereby;

5

That said defendant herein did, prior to November 9th, 1951, execute and deliver unto the Toni Company, a division of Gillette Safety Razor Company of Chicago, Illinois, a policy of liability insurance insuring and protecting said company from all acts of negligence on its part and agreeing to pay on its behalf any and all amounts awarded to any person for damages because of any act of negligence on its part, either of commission or omission, which said policy of insurance was in full force and effect on November 9, 1951;

6

That on or about the 9th day of November, 1951, petitioner, Mrs. Ruth S. Watson, did purchase from Morgan & Lindsey Company, Arcadia, Louisiana, a new "Toni Home Permanent" set for the retail price of $1.22, including tax, prepared, made and manufactured by said Toni Company;

7

That said Morgan & Lindsey Company was and is a retail outlet for the sale and distribution of the products manufactured and distributed by said Toni Company, particularly of the "Toni Home Permanent" sets;

8

That after acquiring said "Toni Home Permanent" as aforesaid petitioner, Mrs. Ruth S. Watson, proceeded to apply the same in strict accordance with the set of directions accompanying and forming a part of the same, and in [fol. 4] complete accord therewith;

9

That as a result of the application and use of said "Toni Home Permanent," petitioner, Mrs. Ruth S. Watson, became seriously and desperately ill;

10

That on the morning of November 10, 1951 following the use and application of said "Toni Home Permanent" peti-

tioner, Mrs. Ruth S. Watson's scalp, shoulders and arms began to itch considerably and broke out in red, disfiguring bumps as did her head, which itching and bumps increased markedly and they spread over her entire body, from the top of her head to her ankles and she was entirely covered with large, swollen, red areas accompanied by severe itching;

12

That petitioner, Mrs. Ruth S. Watson, consulted a physician who made test, placing her on a strict diet and prescribed Linnit Starch baths;

12

That as a result of the use of said "Toni Home Permanent" petitioner, Mrs. Ruth S. Watson, ever since the application thereof, has had her entire body covered with red and swollen areas with much itching accompanied by the loss of much strength and energy;

13

That as a further result of the use of said "Toni Home Permanent" petitioner, Mrs. Ruth S. Watson, was immediately required to cease work, she having heretofore earned [fol. 5] Eighteen & No/100 ($18.00) per week as a sales clerk in a store and has been unable to work or carry on her usual activities since;

14

That petitioner, B. Clinton Watson, was required to expend for the use and benefit of his said wife the following sums:

Browning Clinic	$181.00
Boyce Clinic	9.50
Arcadia Hospital (Dr. A. E. Ussery)	35.00
Peyton Drug Company (Drugs)	10.00
New Arcadia Drug Store (Drugs)	50.00
Total	$285.00;

15

That additional medical treatment will be required which petitioners estimate at One Thousand and no/100 ($1,000.00) Dollars;

16

That petitioners have been informed and believe and upon such information and belief allege that among other ingredients of said "Toni Home Permanent" is a chemical called thiogloycomin, which is highly detrimental to and dangerous to human beings;

17

That petitioner, Mrs. Ruth S. Watson, forty-two (42) years of age and her life expectancy is 26.22 years;

18

That petitioner, B. Clinton Watson, shows that he has been damaged as follows:

[fol. 6] a. Doctors bills to date	$ 225.50
b. Medical supplies to date	60.00
c. Estimated future medical expense for his wife	1,000.00
d. Loss of earnings of his wife at $18. per week for 26.22 years	24,541.92;

19

That petitioner, Mrs. Ruth S. Watson, shows that she has been damaged and injured in the full amounts and for the following reasons, to-wit:

a. Pain and suffering, physical and mental, past, present and future	$40,000.00
b. Permanent injury to her body, with accompanying embarrassment and humilation	10,000.00;

20

That said Toni Company is in complete possession of all knowledge of the manufacture, ingredients and effects of

said "Toni Home Permanent", the manner of the manufacture thereof and the materials used therein, and therefore the doctrine of res *ispa* loquitur applies in this case, which doctrine petitioners specially plead in addition to all other facts and matters herein alleged;

21

That petitioners desire and are entitled to have this case tried by a jury as to all issues;

Wherefore, petitioners pray that the said Employers Liability Assurance Corporation, Ltd. be duly served through the Secretary of State of Louisiana with a copy [fol. 7] of this petition and cited to appear and answer the same; that after all legal delays and due proceedings had there be judgment herein in favor of petitioners and against said Employers Liability Assurance Corporation, Ltd. as follows: in favor of petitioner, B. Clinton Watson in the full sum of Twenty-Five Thousand Eight Hundred Twenty-seven & 42/100 ($25,827.42) Dollars and in favor of petitioner, Mrs. Ruth S. Watson, in the full sum of Fifty Thousand & No/100 ($50,000.00) Dollars, all with five (5%) per cent per annum interest on said sums from date of judicial demand until paid and all costs of this suit;

Petitioners further pray that this case be tried by a jury as to all issues;

Petitioners further pray for all necessary orders and decrees and for full, general and equitable relief.

(Sgd.) Luther S. Montgomery, 1305 Slattery Building, Shreveport, Louisiana. Lunn, Irion, Switzer, Trichel & Johnson. By (Sgd.) Richard H. Switzer, 1305 Slattery Building, Shreveport, Louisiana, Attorneys for Petitioners.

[fol. 8] *Duly sworn to by Richard H. Switzer. Jurat omitted in printing.*

[File endorsement omitted.]

In United States District Court, Western District of Louisiana, Shreveport Division

Civil Action No. 3700

B. Clinton Watson, et ux.

vs.

Employers Liability Assurance Corporation, Limited

Petition for Removal—Filed April 16, 1952

To the United States District Court for the Western District of Louisiana, Shreveport Division:

[fol. 9] Your petitioner, The Employers Liability Assurance Corporation, Limited, a corporation, respectfully shows:

1

That on the third day of April 1952, B. Clinton Watson and Mrs. Ruth S. Watson, filed an action in the Second Judicial District Court, in and for the Parish of Bienville, State of Louisiana, against your petitioner as the sole defendant, said action being entitled "B. Clinton Watson et ux. v. Employers Liability Assurance Corporation, Ltd.", bearing docket No. 14,459 of said State Court.

2

That a citation and certified copy of plaintiffs' petition setting forth the claim for relief upon which the action is based was served upon your petitioner through the Secretary of the State of Louisiana on the 7th day of April 1952; that the time within which your petitioner is required to file this petition for removal in order to remove this cause from the said State Court to this Court has not yet expired.

3

That the said action is one of a civil nature, over which the district courts of the United States have original jurisdiction; the said action having been brought by the plaintiffs against your petitioner for damages for alleged per-

sonal injuries received by Mrs. Ruth S. Watson and for medical expenses and loss of earnings of her husband, B. Clinton Watson.

4

That the matter in dispute exceeds the sum of $3,000.00, exclusive of interest and costs; the suit being for the sum of [fol. 10] $25,827.42 for plaintiff, B. Clinton Watson, and for the sum of $50,000.00 for plaintiff, Mrs. Ruth S. Watson, as will more fully appear from plaintiffs' petition, a certified copy of which is hereto attached and made a part hereof.

5

That, at the time of the commencement of this action and since that time, the plaintiffs, B. Clinton Watson and Mrs. Ruth S. Watson, were, and are now, each citizens and residents of the State of Louisiana and of the Parish of Bienville, Louisiana and your petitioner, The Employers Liability Assurance Corporation, Limited, the only defendant in this action, was, and still is, a corporation organized and existing under and by virtue of the laws of the Kingdom of Great Britain, having its home office at London, England, and was, and is, a citizen thereof and a non-resident of the State of Louisiana; that the controversy is, and at the time of the commencement of this action was, between citizens of the State of Louisiana and a citizen or subject of a foreign state.

6

That your petitioner files herewith a bond with good and sufficient surety for paying all costs and disbursements incurred by reason of these removal proceedings, if this Court shall hold that the action was not removable or improperly removed thereto.

7

That your petitioner files herewith all process, pleadings and orders served upon it in this action.

Wherefore, your petitioner prays that this action be removed from the State Court to this, the United States Dis-

[fol. 11] trict Court, in and for the Western District of Louisiana, Shreveport Division.

Dated: April 16th, 1952.

Cook, Clark & Egan, (Sgd.) by Benjamin C. King, Attorneys for the Employers Liability Assurance Corporation, Ltd., 1500 Commercial Bank Building, Shreveport, Louisiana.

[File endorsement omitted.]

In United States District Court

Supplemental and Amended Complaint—Filed April 18, 1952

Now into Court, through undersigned counsel, come B. Clinton Watson and Mrs. Ruth S. Watson, complainants herein and hereby amend and supplement their original complaint in this cause in the following respects:

1

That they adopt all of the allegations of their original complaint except as it may be herein modified;

2

That the Toni Company referred to in their original complaint is a department or a portion of Gillette Safety Razor Company, a Delaware Corporation, not authorized to do business in Louisiana;

3

That said Gillette Safety Razor Company, although not authorized to do business in Louisiana, is actually and has [fol. 12] been for some years doing business in Louisiana and maintains its Southern Division in the City of New Orleans, Orleans Parish, Louisiana, at 521 International Mart Building, said City;

4

That prior to the accident complained of in complainants' original complaint, defendant, Employers Liability Assur-

ance Corporation, Ltd., had issued its policy of liability insurance unto said Gillette Safety Razor Company insuring it and its Toni Company Department all as set forth in Article 5 of their original complaint filed herein;

5

That said Gillette Safety Razor Company should be served with certified copies of both the original and this supplemental complaint as required by law;

6

That complainants amend Article 20 of their original complaint by adding thereto Gillette Safety Razor Company along with the Toni Company;

Wherefore, complainants pray that this supplemental and amended complaint be allowed; that after all legal delays and due proceedings had, there be judgment herein in favor of complainants and against Gillette Safety Razor Company and Employers Liability Assurance Corporation, Ltd., in solido, in the sum of Twenty-Five Thousand Eight Hundred Twenty-seven & 42/100 ($25,827.42) Dollars in favor of complainant, B. Clinton Watson, and in the sum of Fifty Thousand & No/100 ($50,000.00) Dollars in favor of complainant, [fol. 13] Mrs. Ruth S. Watson, together with legal interest thereon from date of judicial demand until paid and all costs of this suit;

They further pray for trial by jury on all issues of this cause;

They further pray that Gillette Safety Razor Company be made a party defendant hereto and that certified copies of the original complaint and this supplemental and amended complaint be served on said defendant in accordance with law;

They further pray for all necessary orders and decrees and for full, general and equitable relief.

(Sgd.) Luther S. Montgomery, Lunn, Irion, Switzer, Trichel & Johnson, by Richard H. Switzer, Attorneys for Complainants.

Certificate of Service—(Omitted in Printing)

[File endorsement omitted.]

[fol. 14] IN UNITED STATES DISTRICT COURT

OBJECTION TO ALLOWANCE OF SUPPLEMENTAL AND AMENDED COMPLAINT AND ALTERNATIVE MOTION TO DROP THE GILLETTE SAFETY RAZOR COMPANY AS PARTY DEFENDANT—Filed April 28, 1952

Defendant, The Employers' Liability Assurance Corporation, Limited, with respect shows:

1

That this action was filed by complainants on April 3, 1952 against The Employers' Liability Assurance Corporation, Limited, as insurer on a policy of public liability insurance of The Toni Company, a division of the Gillette Safety Razor Company, pursuant to the provisions of Section 655 of Title 22 of the Louisiana Revised Statutes of 1950, as amended.

2

That the complainants, having elected to proceed in a direct action against the insurance company alone, have no right to join the assured under said policy of public liability insurance, Gillette Safety Razor Company, as a defendant in this action, and your appearer objects to the [fol. 15] allowances of the supplemental and amended complaint.

3

In the alternative, your defendant shows that Gillette Safety Razor Company should be dropped as a party defendant.

Wherefore, your defendant, The Employers' Liability Assurance Corporation, Limited, prays that its objection to the allowance of the supplemental and amended complaint, seeking to join Gillette Safety Razor Company as a defendant, be sustained.

In the alternative, it prays that Gillette Safety Razor Company be dropped as a party defendant.

Cook, Clark & Egan, (Sgd.) by Benjamin C. King, Attorneys for Defendant, The Employers' Liability Assurance Corporation, Limited, 1500 Com-

mercial National Bank Bldg., Shreveport, Louisiana.

Certificate of Service—(omitted in printing).

[File endorsement omitted.]

[fol. 16] IN UNITED STATES DISTRICT COURT

MOTION OF THE EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LIMITED, TO DISMISS AND PLEA OF UNCONSTITUTIONALITY—Filed April 28, 1952

The Employers' Liability Assurance Corporation, Limited, defendant, respectfully shows:

1

Defendant is an insurance corporation organized under the laws of the Kingdom of Great Britain, authorized to do and doing business in the State of Louisiana.

2

The policy of insurance referred to in Article 5 of the complaint herein, the existence of which is the sole basis of the asserted cause of action of the complainants, was issued and delivered to the Gillette Safety Razor Company in Boston, Massachusetts, and a copy thereof was delivered to The Toni Company in Chicago, Illinois. A certified copy of said policy of insurance is hereto attached and herein incorporated, as well as affidavit of F. H. Close.

3

The policy of insurance referred to in the preceding article contains the following provisions:

> "No action shall lie against the company unless, as a condition precedent thereto, the insured shall have fully complied with all the terms of this policy, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment

[fol. 17] against the insured after actual trial or by written agreement of the insured, the claimant and the company:

Any person or organization or the legal representative thereof who has secured such judgment or written agreement shall thereafter be entitled to recover under this policy to the extent of the insurance afforded by this policy. Nothing contained in this policy shall give any person or organization any right to join the company as a co-defendant in any action against the insured to determine the insured's liability."

"Terms of this policy which are in conflict with the statutes of the state wherein this policy is issued are hereby amended to conform to such statutes."

4

That the amount of the obligation of the assured, under said policy, if any obligation there be, to complainants has never been determined by judgment after trial, or by written agreement of the assured, the complainants and the defendant.

5

That under the Legislative Acts and jurisprudence of [fol. 18] the States of Massachusetts and Illinois, the provisions of the insurance contract quoted in Article 3 hereof are valid and a direct action against defendant prior to the determination of the assured's obligation either by judgment against the assured after actual trial, or by written agreement of the assured, the complainants and the defendant is prohibited.

That full faith and credit must be given to the aforementioned insurance contract and particularly to the provisions thereof above quoted, and to Legislative Acts and jurisprudence of the States of Massachusetts and Illinois, and, therefore, complainants are without the right to sue defendant as a result of the accident described in the complaint and supplemental and amended complaint herein.

7

That failure to give full faith and credit, and failure to enforce the provisions of the insurance contract above

quoted, would violate Section 1, Article 4 and Section 10, Article 1, and Section of the Fourteenth Amendment of the Constitution of the United States and Section 15 of Article 4 of the Constitution of the State of Louisiana — in that such action would:

(a) Impair the obligation of the defendant's contract with The Toni Company.

(b) Deny to defendant its right to have the Courts of Louisiana and the Federal Court sitting in Louisiana, give full faith and credit to the Legislative Acts and jurisprudence of the States of Massachusetts and [fol. 19] Illinois.

(c) Deprive the defendant of its property and rights without due process of law.

(d) Deny to defendant equal protection of the law.

8

That Act 55 of the Louisiana Legislative Session of 1930, as amended; Section 14.45 of Act 195 of the Louisiana Legislative Session of 1948; Section 655 of Title 22 of the Louisiana Revised Statutes of 1950 and Acts 541 and 542 of the Louisiana Legislative Session of 1950, under which this proceeding is brought, do not apply under the facts of this case, or, if applicable, violate the provisions of the Federal and Louisiana Constitutions referred to in Article 7 hereof insofar as the said Acts give, or purport to give, complainants herein a direct cause of action against defendant under the facts set forth in this motion, as evidenced by the decision of this Court in the case of Bish vs. The Employers' Liability Assurance Corporation, Limited, 102 F. Supp. 343.

9

That, accordingly, the complaint herein fails to state a claim against your defendant upon which relief can be granted.

Wherefore, defendant prays that this Motion to Dismiss and Plea of Unconstitutionality be sustained, and that Act 55 of the Louisiana Legislative Session of 1930 as amended; Section 14.45 of Act 195 of the Louisiana Legislative Session of 1948; Section 655 of Title 22 of the Louisi-

[fol. 20] ana Revised Statutes of 1950 and Acts 541 and 542 of the Louisiana Legislative Session of 1950, each be declared unconstitutional, if applicable to this proceeding, in that they violate those sections of the Federal Constitution listed in Article 7 of this motion.

Cook, Clark & Egan, (Sgd.) by Benjamin C. King, Attorneys for Defendant, The Employers' Liability Assurance Corporation, Limited, 1500 Commercial National Bank Bldg., Shreveport, Louisiana.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

MOTION OF THE EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LIMITED TO DISMISS AND ALTERNATIVE MOTION FOR A MORE DEFINITE STATEMENT—Filed April 28, 1952

Defendant, The Employers' Liability Assurance Corporation, Limited, moves the Court:

1

To dismiss the action because the complaint fails to state a claim against defendant upon which relief can be granted.

2

Alternatively, for an order directing complainant to file a more definite statement of the following matters:

(a) The ingredients of the "Toni Home Permanent" used by complainant, Mrs. Ruth S. Watson, and the [fol. 21] respects in which said ingredients are detrimental to and dangerous to human beings.

The ground of the alternative motion is that, in regard to the matters pointed out, the complaint is so vague that the defendant cannot reasonably be required to frame a responsive pleading thereto. The complaint is defective in that it constitutes legal conclusions of the pleaders, is

not a clear and concise statement, and complainants should state the facts upon which they base their allegations.

Wherefore, defendant prays that this Motion to Dismiss be sustained and the suit of complainants dismissed at their costs.

Alternatively, defendant prays that Motion for More Definite Statement be sustained and complainants directed to file a more definite statement of the matters above set forth.

Cook, Clark & Egan, (Sgd.) by Benjamin C. King, Attorneys for Defendant, The Employers' Liability Assurance Corporation, Limited, 1500 Commercial National Bank Bldg., Shreveport, Louisiana.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

MOTION OF THE GILLETTE COMPANY AND SHELDON FLYNN TO DISMISS AND ALTERNATIVE MOTION TO QUASH THE SERVICE AND CITATION—Filed May 12, 1952

The Gillette Company and Sheldon Flynn move the Court [fol. 22] to dismiss this action for failure to state a claim upon which relief can be granted and in the alternative to quash the service and citation upon Gillette Safety Razor Company on the following grounds:

1

That since March 26, 1952 there has been no corporation named Gillette Safety Razor Company.

2

That the Toni Company, at the time the supplemental and amended complaint was filed herein on April 18, 1952, was and is a division of the Gillette Company.

3

That Sheldon Flynn on April 18, 1952 was not an employee of the Gillette Safety Razor Company but was an employee of the Gillette Company.

4

That the citation issued herein to the Gillette Safety Razor Company and service upon the Gillette Safety Razor Company through Sheldon Flynn were invalid for the reasons hereinabove set forth.

Wherefore appearers pray that this motion to dismiss be sustained and the complainants' suit against the Gillette Safety Razor Company be dismissed. In the alternative appearers pray that the citation issued herein to the Gillette Safety Razor Company and service thereof upon Sheldon Flynn be quashed and set aside and the complainants' suit be dismissed at their cost.

[fol. 23] Cook, Clark & Egan, (Sgd.) by Benjamin C. King, Attorneys for Gillette Company and Sheldon Flynn, 1500 Commercial National Bank Bldg., Shreveport, Louisiana.

Certificate of Service—(omitted in printing).

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

SUPPLEMENTAL AND AMENDED PETITION—Filed May 13, 1952

Now into this Honorable Court, through undersigned counsel, come B. Clinton Watson and Mrs. Ruth S. Watson, complainants in the above numbered and entitled cause, and file this their second supplemental and amended petition and with respect, show:

1

That since the filing of their original complaint herein on April 5, 1952, they have been informed, and on such in-

formation allege, that the Gillette Safety Razor Company, named defendant herein, has been dissolved and its assets transferred to a corporation styled "The Gillette Company", which is a corporation organized and existing under [fol. 24] and by virtue of the laws of the State of Delaware, or has merged with said corporation;

2

That on such information, complainants show that said Gillette Company succeeded to all of the assets of Gillette Safety Razor Company and assumed all of its obligations and liabilities, including its liabilities to complainants herein;

3

That because of the corporate manipulations of said Gillette Company and said Gillette Safety Razor Company, complainants show that said Gillette Company is in reality an alter ego of Gillette Safety Razor Company with the same liabilities and obligations and said Gillette Company should be made a defendant herein;

4

That said Gillette Company is not authorized to do business in Louisiana but is actually doing business in Louisiana and maintains its Southern Division in the City of New Orleans, Orleans Parish, Louisiana, at 521 International Mart Building, said City;

Wherefore, complainants pray that the Gillette Company be served with a copy of the original petition and first supplemental petition filed herein and with a copy of this supplemental petition through its representatives at New Orleans, Louisiana, and cited to appear and answer hereto within the delay prescribed by law and that after due proceedings shall have been had, there be judgment herein in favor of petitioners and against the Gillette Company and the Gillette Safety Razor Company, as the Court may determine is the proper corporate entity, in solido, in favor [fol. 25] of B. Clinton Watson in the full sum of $25,827.42 and in favor of Mrs. Ruth S. Watson in the full sum of $50,000.00, with five percent per annum interest on all of said sums from date of judicial demand until paid;

Complainants further pray for all necessary orders and decrees and for full, general and equitable relief and for trial by jury.

(Sgd.) Luther S. Montgomery, Lunn, Irion, Switzer, Trichel & Johnson, by Richard H. Switzer, Attorneys for Complainants, 1305 Slattery Building, Shreveport, Louisiana.

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

MOTION OF THE GILLETTE COMPANY TO QUASH SERVICE OF SUMMONS AND ATTACKING JURISDICTION OF THE COURT—Filed June 13, 1952

The Gillette Company, appearing herein solely and only for the purpose of making this motion to question the jurisdiction of the court over its person and for said purpose only, moves the court to set aside and quash the supposed service of summons upon the defendant herein, and as grounds therefor, shows to the court the following:

1. This court lacks jurisdiction over the person of the defendant.

2. Service of the alleged process herein is insufficient.

[fol. 26] 3. The venue herein is improper and contrary to law.

4. That the defendant, The Gillette Company (formerly Gillette Safety Razor Company, a change of name to The Gillette Company having been made effective on the 26th day of March, 1952), a corporation, before and at the time of the commencement of this suit, was and ever since has been, a corporation organized and existing under and by virtue of the laws of the State of Delaware, with its executive offices and principal place of business at 15 W. First Street, Boston 6, Massachusetts; that said defendant is not and never was a corporation organized or existing under the laws of the State of Louisiana, or a resident of Louisiana, and is not and never has been licensed or qualified under the laws of the State of Louisiana to do business in the State

of Louisiana; that said defendant never has appointed or authorized any agent to accept service of process for it in any suit in the State of Louisiana; and that the said defendant at the time of the supposed service of summons herein was not found within the State of Louisiana.

5. That the defendant did not at the time of the alleged service of summons or at any time have any officer or local or general agent of any kind in the State of Louisiana, who did or could manage the business of this defendant or accept service of process on behalf of this defendant in Louisiana.

6. The purported service of summons herein and writ thereof by the United States Marshall is illegal and void in that Sheldon Flynn or any employee in the office at 521 International Mart Building, New Orleans, Louisiana, never had any authority to accept service of summons on behalf [fol. 27] of this defendant; that said Sheldon Flynn and the employees in the office at 521 International Mart Building, New Orleans, had authority only to solicit business and orders for the goods of this defendant, and to submit such orders to the defendant for its acceptance or rejection at its offices at 15 W. First Street, Boston 6, Massachusetts, where such orders were and are either accepted or rejected by said defendant; That no stock of goods or merchandise belonging to the defendant for the purpose of sale or for shipment to customers of the defendant has been maintained in Louisiana; that all goods and merchandise sold by defendant to its customers residing within the State of Louisiana or elsewhere, upon orders so accepted at Boston, Massachusetts, were and are shipped directly by defendant to such customers from defendant's factory in Boston, Massachusetts; and that title to all said products shipped to purchasers in Louisiana passes to purchasers on delivery to the carrier at Boston, Massachusetts.

7 That the alleged service of summons herein is illegal and void because it deprives defendant of due process of law contrary to the Constitution and the laws of the State of Louisiana and the Constitution of the United States and because it deprives the defendant of equal protection of the laws contrary to the Fourteenth Amendment to the Constitution of the United States and because it places an illegal and unreasonable burden on the Interstate commerce carried on by the defendant as aforesaid, said illegal and unrea-

sonable burden being contrary to the Commerce Clause of Section 8 of Article I of said Constitution, and because otherwise contrary to its rights under the said Constitution and to its rights under the Constitution and laws of the State of Louisiana.

[fol. 28] 8. That the defendant has not accepted or waived and does not accept or waive service of summons herein.

Wherefore defendant prays that this motion be set for taking evidence in support hereof and, after hearing duly had, that this motion to dismiss for lack of jurisdiction be sustained and the complainants' suit be dismissed. In the alternative, defendant prays that the citation issued herein to *to* it through Sheldon Flynn and service thereof upon the employee in the New Orleans office, aforesaid, be quashed and set aside and the complainants' suit dismissed at their costs.

Cook, Clark & Egan, (Sgd.) by Benjamin C. King, Attorneys for The Gillette Company, 1500 Commercial Bank Bldg., Shreveport, Louisiana.

Certificate of Service—(omitted in printing).

[File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

OBJECTION OF THE EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LIMITED TO ALLOWANCE OF SECOND SUPPLEMENTAL AND AMENDED COMPLAINT AND ALTERNATIVE MOTION TO DROP THE GILLETTE COMPANY AS PARTY DEFENDANT—Filed [fol. 29] June 25, 1952

Defendant, The Employers' Liability Assurance Corporation, Limited with respect shows:

1

That this action was filed by complainants on April 3, 1952 against The Employers' Liability Assurance Corporation, Limited, as insurer on a policy of public liability in-

surance of The Toni Company, a division of the Gillette Safety Razor Company, pursuant to the provisions of Section 655 of Title 22 of the Louisiana Revised Statutes of 1950, as amended.

2

That the complainants, having elected to proceed in a direct action against the insurance company alone, have no right to join the Gillette Company as a defendant in this action, and your appearer objects to the allowance of the second supplemental and amended complaint.

3

In the alternative your defendant shows that The Gillette Company should be dropped as a party defendant.

Wherefore your defendant, The Employers' Liability Assurance Corporation, Limited, prays that its objection to the allowance of the second supplemental and amended complaint, seeking to join the Gillette Company as a defendant, be sustained.

In the alternative it prays that the Gillette Company be dropped as a party defendant.

[fol. 30] Cook, Clark & Egan, (Sgd.) by Benjamin C. King, Attorneys for Defendant, The Employers' Liability Assurance Corporation, Limited, 1500 Commercial National Bank Building, Shreveport, Louisiana.

[File endorsement omitted.]

In United States District Court

Minutes of the Court—July 11, 1952

By agreement all pending motions were ordered submitted on briefs; defendant's brief to be filed within 30 days and plaintiff's brief 10 days thereafter.

Ordered that the Court be adjourned.

In United States District Court

Affidavit of Milton C. Trichel, Jr.—Filed July 11, 1952

State of Louisiana,
Parish of Caddo:

Before me, the undersigned authority, personally came and appeared Milton C. Trichel, Jr., who, being by me first [fol. 31] sworn, deposes and says:

That he is a practicing attorney of the Shreveport, Louisiana Bar and is a resident and citizen of Shreveport, Caddo Parish, Louisiana;

That during the first week of April, 1952 he visited the City of New Orleans, Louisiana and while there visited the establishment of the Gillette Safety Razor Company in the International Trade Mart Building at 124 Camp Street, said City;

That he found that said Gillette Safety Razor Company maintains a District Sales Office at 521 International Trade Mart Building and that said Gillette Safety Razor Company has its name printed or painted upon the door of said building leading to said offices; that numerous products of said company were displayed in said office; that he saw therein at least two employees of said company, one male and one female; that the New Orleans telephone directory carries a listing in the name of Gillette Safety Razor Company and gives the telephone number as Raymond 1740; that he was advised by the personnel in said office that said Gillette Safety Razor Company made sales and transacted all kinds of business of said company through said office, both in the State of Louisiana and elsewhere; that he was advised by said personnel that said office was the Southern Division Sales Office of the Gillette Safety Razor Company;

Further deponent sayeth not.

(Sgd.) Milton C. Trichel, Jr.

Sworn to and Subscribed before me, Notary, on this the 7th day of July, 1952. (Sgd.) Harry A. Johnson, Jr., Notary Public.

[fol. 32] [File endorsement omitted.]

IN UNITED STATES DISTRICT COURT

AFFIDAVIT OF RICHARD H. SWITZER

STATE OF LOUISIANA,
Parish of Caddo:

Before me, the undersigned authority, personally came and appeared Richard H. Switzer, who, being by me first duly sworn, deposes and says:

That he is a practicing attorney of the Shreveport Louisiana Bar and is a citizen and resident of the City of Shreveport, Caddo Parish, Louisiana;

That on June 2nd, 1952 he visited the City of New Orleans, Louisiana; that while in said City he visited the International Trade Mart Building at 124 Camp Street, said City, where he found that the Gillette Saftey Razor Company maintained an establishment and offices at suite 521 in said building; that he saw at said suite complete displays of said company's merchandise, including hair wave sets; that its name is painted on the entrance of said suite and posted on a bulletin board in the lobby of said building; that there were two employees of said company at work and on duty in said offices at said time and one customer; that he saw a telephone therein and upon inspection of the New Orleans telephone directory found a listing therein in the name of Gillette Safety Razor Company, giving the telephone number as Raymond 1740;

[fol. 33] That he has checked in several cities in the State of Louisiana and finds that Gillette Safety Razor Company's products are sold at retail in all of said cities in Drug Stores, Five & Ten Cent Stores, Novelty Stores including razors, razor blades, shaving cream and Toni Home Sets;

That he interviewed the Assistant Manager of said International Trade Mart Building, after first ascertaining that the manager was absent from the city; that he inspected a standard form of lease required of all tenants of said International Trade Mart Building, including said Gillette Safety Razor Company, said lease being identical to the lease signed by said Gillette, and that said lease required said tenant to transact at least a wholesale business from

said premises; that he also obtained from said Assistant Manager a pamphlet setting forth the purposes and aims of said International Trade Mart, which pamphlet is hereto attached, with particular reference being made to that portion encircled in red on page 3 thereof; that he further ascertained from said Assi-tant Manager that said Gillette was complying with all of the terms and provisions of its lease and particularly that rule of said Mart encircled in red hereinabove referred to;

That while in New Orleans he learned that one Sheldon Flynn styles himself as District Manager of said Gillette Safety Razor Company and that said office styles itself as "District Sales Office"; That the United States Marshal for the Eastern District of Louisiana wrote him a letter stating that the said Sheldon Flyan made extended sales tours for said Gillette Safety Razor Company, as shown by a photostatic copy of letter hereto attached; that affiant attaches hereto photostatic copy of letter received through the United States mail from said office in New Orleans, signed by Sheldon Flynn, District Sales Manager, ad-[fol. 34] dressed to one R. W. Smalling at Shreveport, Louisiana, in reply to a letter affiant is informed was written to said office in New Orleans, Louisiana;

Further deponent sayeth not.

(Sgd.) Richard H. Switzer.

Sworn to and subscribed before me, Notary, on this the 7th day of July, 1952. (Sgd.) Harry A. Johnson, Jr., Notary Public.

GILLETTE SAFETY RAZOR COMPANY
District Sales Office
521 International Trade Mart
124 Camp Street
New Orleans 12 La.
Phone RAymond 1740

April 8, 1952.

Mr. R. W. Smalling
Radio Station KRMD
Shreveport, Louisiana

DEAR SIR:

This will acknowledge your letter of April 5 relative to your broken Gillette razor.

If you will send the razor to us, we will be pleased to replace same for you. Or, you may return your razor directly to the factory (15 West First Street, Boston 6, Mass.) and a replacement will also be made.

Thanking you for your interest in our products, and calling our attention to the imperfect razor.

Very truly yours, Gillette Safety Razor Company,
(Sgd.) Sheldon Flynn, District Manager.

SF:mkh.

[fol. 35] DEPARTMENT OF JUSTICE

United States Marshal
Eastern District of Louisiana
New Orleans, Louisiana

May 20, 1953.

Messrs. Irion & Switzer
Attorneys at law
1305 Slattery Bldg.
Shreveport, Louisiana

Re: C. A. No. 3697, MRS. MARIE BISH, et vir,
Re: C. A. No. 3700, B. C. WATSON, et ux,

vs.

GILLETTE SAFETY RAZOR CO., et al.

GENTLEMEN:

We have made two attempts to serve the Gillette Safety Razor Company, through Mr. Sheldon Flynn in the International Mart Bldg., here in New Orleans. We have been advised that Mr. Flynn is on an extended sales tour and that he will possibly not return to New Orleans for about a month.

I will appreciate it if you will advise me whether you want me to retain the services we have in the above matter and attempt to serve Mr. Flynn when he returns.

Yours very truly,

Louis F. Knop, Jr., U. S. Marshal. (Sgd.) P. A. Gandy, per G., Chief Deputy.

ITEM IN PAMPHLET PUBLISHED BY INTERNATIONAL TRADE MART

The Trade Mart is not merely a place where goods are exhibited but also a place where goods actually are bought and sold—where all arrangements of sale are completed [fol. 36] and deliveries arranged. Each tenant is required to maintain sales personnel as well as to display his merchandise.

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Civil Action No. 52 C 443

MARIE BISH and JAMES N. BISH, Plaintiffs,

vs.

GILLETTE SAFETY RAZOR COMPANY, a corporation, Defendant

AFFIDAVIT OF BOONE GROSS—Filed July 11, 1952

COMMONWEALTH OF MASSACHUSETTS,
County of Suffolk, ss:

Boone Gross, being first duly sworn on oath, deposes and says that he is a resident of Waban, County of Middlesex, Commonwealth of Massachusetts; that since the first day of January 1946, affiant has been employed by the defendant in the above entitled cause, The Gillette Company (formerly Gillette Safety Razor Company, a change of name to The Gillette Company having been made effective on the 26th day of March, 1952), a corporation, organized and existing under the laws of the State of Delaware, having executive offices and the principal place of business and manufacturing plant of its Gillette Safety Razor Company Division at 15 West First Street, Boston 6, Massachusetts, which [fol. 37] Division is engaged in the manufacture and sale of razors, razor blades, and shaving cream; that affiant was the sales manager of defendant from January 1, 1946 to March 26, 1952; that on March 25, 1947 affiant was elected Vice-President of defendant and, since that date, affiant has held and still holds the said office of Vice-President of defendant; that on March 26, 1952, affiant was elected President of defendant's Division, Gillette Safety Razor Company, and since that date affiant has held and still holds the said office of President of defendant's said Division;

That the defendant maintains, and has maintained, an office at 124 Camp Street, New Orleans, Louisiana, only for convenience in the solicitation of orders for said Division's products by its sales representatives, which said sales representatives were never authorized, and never had and do not now have any powers or authority, to represent or

act as agent of the defendant in any other capacity than the solicitation of sales, or for any other purpose than is herein set forth, and have never had, and have not now, any power or authority to enter into any contract or make any sales or other contracts on behalf of the defendant, but are appointed by said defendant merely to solicit orders in New Orleans and adjoining trade territory for said Division's products, and to submit such orders to the defendant for its acceptance or rejection at its offices at 15 West First Street, Boston 6, Massachusetts, where such orders were and are either accepted or rejected by said defendant;

That no stock of goods or merchandise belonging to the defendant for the purpose of sale or for shipment to customers of the defendant or for any other purpose has been [fol. 38] maintained in Louisiana; that all goods and merchandise sold by defendant to its customers residing within the State of Louisiana or elsewhere, upon orders so accepted at Boston, Massachusetts, were and are shipped directly by defendant to such customers from defendant's factory in Boston, Massachusetts; that title to all said products shipped to purchasers in Louisiana passes to purchasers on delivery to the carrier at Boston, Massachusetts; that attached hereto, marked exhibit "A" and made a part hereof, is a true and correct copy of the sales order form used by sales representatives of said Division in Louisiana and elsewhere, and attached hereto, marked exhibit "B" and made a part hereof, is a true and correct copy of the invoice used by said Division in invoicing customers in the State of Louisiana and elsewhere; that the said sales order and invoice do not contain the address of the office maintained at 124 Camp Street, New Orleans, Louisiana;

That the lease for the office at 124 Camp Street, New Orleans, Louisiana referred to in the affidavit of Milton C. Trichel, Jr. (filed herein on behalf of the plaintiff), was executed on behalf of the defendant at its offices at Boston, Massachusetts and that no lease for said premises was executed by the defendant at any time in the State of Louisiana; that the defendant has not and does not now maintain any bank account in the State of Louisiana; that all salaries and bonuses paid to said Division's sales representatives

in Louisiana have been paid at all times directly from defendant's offices at Boston, Massachusetts;

That defendant is not and never was a corporation organized or existing under the laws of the State of Louisiana or a resident of Louisiana, and is not and never has been [fol. 39] licensed or qualified under the laws of the State of Louisiana to do business in Louisiana; that defendant never has appointed or authorized any agent to accept service of process for it in any suit in the State of Louisiana.

Further, affiant saith not.

(Sgd.) Boone Gross.

Subscribed and sworn to this 22nd day of May, A. D. 1952, before me, a notary public, who hereby certify under my official seal that I am duly authorized by the laws of the Commonwealth of Massachusetts to administer oaths in the county and state aforesaid. (Sgd.) Malcolm C. Stevens, Notary Public. My Commission Expires January 2, 1953.

[File endorsement omitted.]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

Civil Action No. 52 c 443

MARIE BISH and JAMES N. BISH, Plaintiffs,

vs.

GILLETTE SAFETY RAZOR, a Corporation, Defendant

AFFIDAVIT OF SHELDON FLYNN—Filed July 11, 1952

[fol. 40] STATE OF TENNESSEE,
County of Shelby, ss:

Sheldon Flynn, being first duly sworn on oath deposes and says that he resides at 1459 Owens Boulevard, New Orleans, Parish of Orleans, State of Louisiana; that since the 22nd day of December, 1941, except for the period from May 22, 1943, to April 26, 1946, during which time

he served in the armed forces of the United States, affiant has been employed in various capacities by the defendant in the above entitled cause, The Gillette Company (formerly Gillette Safety Razor Company, a change of name to The Gillette Company having been made effective on the 26th day of March 1952), a corporation, organized and existing under the laws of the State of Delaware, having executive offices and the principal place of business and manufacturing plant of its Gillette Safety Razor Company Division at 15 West First Street, Boston 6, Massachusetts, which Division is engaged in the manufacture and sale of razors, razor blades and shaving cream; that affiant now is the District Sales Manager for the sole and only purpose of soliciting orders in the New Orleans district and adjoining trade territory for said Division's products; that affiant has never had and does not now have any power or authority to accept such orders or to enter into any contract or to make any sales on behalf of said defendant, but was and is appointed as aforesaid by said defendant merely to solicit orders in New Orleans and adjoining trade territory for said Division's products and to submit such orders to the defendant for its acceptance or rejection at its offices at 15 West First Street, Boston 6, Massachusetts, where such (fol. 41) orders were and are either accepted or rejected by said defendant; title to all said products shipped to purchasers in Louisiana passes to purchasers on delivery to the carrier at Boston, Massachusetts; that affiant was and is employed by said defendant on a salary and bonus basis; that salary and bonuses are paid to the affiant at all times directly from defendant's offices at Boston 6, Massachusetts; that affiant was never appointed or authorized by defendant to, and never had, and does not now have, any power or authority to represent or act as agent of said defendant in any other capacity or for any other purpose than as hereinbefore set forth and has not entered into any contract or made any sales on behalf of said defendant; that the defendant is not and never was a corporation organized or existing under the laws of the State of Louisiana or a resident of Louisiana, and is not and never has been licensed or qualified under the laws of the State of Louisiana to do business in Louisiana; that said

defendant never has appointed or authorized any agent to accept service of process for it in any suit in the State of Louisiana; that defendant has an office at 124 Camp Street, New Orleans, Louisiana, for the convenience of the solicitation only of orders by the affiant and one other sales representative, who is employed and bound in the solicitation of orders in the same manner as the affiant aforesaid; that no stock of goods or merchandise belonging to the defendant for the purpose of sale or for shipment to customers of defendant or for any other purpose has been maintained in Louisiana; that all goods and merchandise sold by said defendant to its customers residing within the State of Louisiana or elsewhere, upon orders so accepted by the defendant at Boston, Massachusetts, were and are shipped directly by defendant to such customers from defendant's [fol. 42] factory in Boston, Massachusetts; that affiant is not, and has never been, an officer or director of the defendant; that affiant was never appointed or given any power or authority by defendant, that he never had and has not now any power or authority whatever, to accept service of summons on behalf of said defendant in this or any other suit against said defendant.

Further, affiant saith not.

(Sgd.) Sheldon Flynn.

Subscribed and sworn to this 22nd day of May, A. D. 1952, before me, a notary public, who hereby certify under my official seal that I am duly authorized by the laws of the State of Tennessee to administer oaths in the county and state aforesaid. (Sgd.) Florence M. Wehrheim, Notary Public. My com. exp. 7-7-53. (Seal.)

Certified Copy. D. C. Form No. 30

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

I, Roy H. Johnson, Clerk of the United States District Court in and for the Northern District of Illinois, do hereby certify that the annexed and foregoing is a true and full

copy of the original Affidavit of Boone Gross and Affidavit of Sheldon Flynn filed May 26, 1952, in the case of:

[fol. 43] No. 52 C 443

MARIE BISH and JAMES N. BISH

vs.

GILLETTE SAFETY RAZOR COMPANY, a Corporation

now remaining among the records of the said Court in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Chicago, Illinois, this 2nd day of July, A.D. 1952.

(Sgd.) Roy H. Johnson, Clerk, by (Sgd.) Eleanor B. Davis, Deputy Clerk.

[File endorsement omitted.]

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA, SHREVEPORT DIVISION

Civil Action

No. 3700

B. CLINTON WATSON, et ux.

v.

EMPLOYERS LIABILITY ASSURANCE CORPORATION, LTD.

OPINION OF THE COURT ON MOTION TO DISMISS—September 12, 1952

* * * * * * *

[fol. 44] DAWKINS, J.:

This suit was filed originally in the State Court for Bienville Parish against the insurer, Employers Liability Assurance Corporation, Ltd. (called Employers), alone, of the Gillette Safety Razor Company, (called the Razor Com-

pany), and was moved here by the defendant on the ground of diverse citizenship. The removed record was filed on April 16, 1952, and on the 18th of the same month, plaintiff filed an amended complaint adding the said insured as a party defendant. On April 28, Employers moved to dismiss the suit against the insurer on a plea of unconstitutionality of the direct action statute, No. 541 of the Louisiana Legislature of 1950. On the same day, it filed objections to the allowance of the amended complaint making the Razor Company a party defendant, and, in the alternative, "to drop it" from the case.

Thereafter, motions of the same general character, pleading insufficiency or improper service, etc., as in the Bish case, No. 3697 on the docket of this court, were filed by defendant. Plaintiffs then filed a second amended complaint making the Gillette Company a party defendant. They prayed that this second amendment, with the original and [fol. 45] first amended complaint, be served upon both the Gillette Company and the Razor Company, and for judgment against them "as the Court may determine is the proper corporate entity". In a certificate at the foot of the second amended complaint, counsel for plaintiffs certified that "a copy of the above and foregoing supplemental and amended complaint has been served upon defendant, Gillette Safety Razor Company" and upon Employers "by mailing same to its attorneys of record * * * and that service is being made upon defendant, The Gillette Company, through the proper United States Marshal".

On June 25, counsel for defendant filed on behalf of Employers a similar motion objecting to the allowance of the second amended complaint, and, in the alternative, "to drop" the Gillette Company as defendant.

On April 11, 1952, by agreement of counsel, all pending motions submitted were taken under advisement on briefs.

The issues involved in the motion to dismiss insurer (Employers) on the ground of the unconstitutionality of Act 541 of 1950 are the same as in Bish v. Employers Liability Assurance Corp., Ltd., 102 F. Supp. 343, which was sustained. Nothing in the arguments has caused this Court to change its views, but they have been, in effect, sustained in Fisher v. Home Indemnity Company by the Court of Appeals for this Circuit in its decision handed down on

June 30th last. The only difference is that the suit was filed here after the change made in the State law by the Acts 541 and 542 of 1950, applying to all policies of insurance whether made or delivered in the State or elsewhere. The latter act compels an insurer, as a condition to doing business in this State, to consent in writing to be sued in a direct action alone [fol. 46] upon any policy wherever written, in complete disregard of any "no action" clause. These matters were dealt with fully by this court in the case of Mayo v. Zurich General Accident & Liability Ins. Co., No. 3638 on the docket of this court, decided August 15, 1952. Both statutes were held to be unconstitutional insofar as they dealt with policies written and delivered outside the State of Louisiana, and that the State could not impose the compulsory consent either before or after the insurance company did business here. See also Bayard v. Traders & Gen. Ins. Co., 99 F. Supp. 343, and Bish v. Employers Liability Assurance Corp., Ltd., 102 F. Supp. 343.

Employers will therefore be dismissed from the case for the reasons stated in those decisions.

This leaves the question of whether the plaintiff can retain or continue the action against the Razor Company or the Gillette Company, which were not joined in the original suit in the State Court.

The decisions holding Act 55 of 1930 and Act 541 of the Louisiana Legislature of 1950 (now Sec. 655 of Title 22 of the Revised Statutes of Louisiana) unconstitutional as to contracts made outside the State and valid where made, have had the effect of saying there is no right or cause of action originally against the insurer alone when it was filed in the State Court. It cannot be seen, therefore, that the adding of the insured as another party defendant after removal to this court could breathe life into the case as is now undertaken. Had the plaintiff joined one or both of the Gillette Companies in the suit in the State Court with the insured, it would have been as invalid as it was against the [fol. 47] latter alone. When removed in that condition, it would have been subject to dismissal here since it was just as much a violation of the constitutional rights of the insurer in that form as against it alone. All the more reason why the same purpose cannot be accomplished by adding the insurer here and attempting at the same time to keep the

insured in the case. It would be just as prejudicial to the insurer to have to defend before a jury, jointly with the insured, the issue of responsibility for the accident and the amount to be recovered, if condemned, as if the insured were sued alone. The whole matter, it would seem, turns upon the question of the right of the insurer, under its contract, to have those questions first determined against the insured alone, before being hauled into court for any purpose.

The conclusion thus reached requires a dismissal of the entire case as to all defendants, and it is unnecessary to go into the controversies over service of process, etc.

Done and Signed in Chambers, at Monroe, Louisiana, this 12th day of September, 1952.

(Sgd.) Ben C. Dawkins, Judge.

[File endorsement omitted.]

In United States District Court

Minutes of the Court—September 24, 1952

[fol. 48] This case came on for signing and filing of Judgment. A proposed judgment was presented by counsel for each side. Argument was had, and the Court signed and filed the Judgment presented by the defendant.

It was ordered that the Court be adjourned.

In United States District Court

No. 3700

Judgment—September 29, 1952

This cause came on to be heard on the plea of unconstitutionality and motions of the defendant, The Employers' Liability Assurance Corporation, Limited, to dismiss for failure to state a claim upon which relief can be granted and objecting to the allowance of supplemental complaints joining Gillette Safety Razor Company the Gillette Company as parties-defendants, and on motions of the defendants, Gillette Safety Razor Company and the Gillette Company, to dismiss for failure to state a claim upon which relief can be granted, evidence having been adduced, the matter

briefed, argued and submitted and the Court having sustained the plea of unconstitutionality in part and granted the said motions for reasons assigned in the written opinion filed herein:

It is hereby ordered, adjudged and decreed that Acts 541 and 542 of the Louisiana Legislative Session of 1950, inso- [fol. 49] far as they apply to an insurance company issuing and delivering a policy of public liability insurance outside the State of Louisiana, be and the same are hereby declared to be unconstitutional, null and void.

It is further ordered, adjudged and decreed that this action in all its aspects, be dismissed as to all defendants and that defendants recover their cost.

Judgment rendered, read aloud and signed in Open Court at Shreveport, Louisiana, on this 29 day of September, 1952.

Ben C. Dawkins, Judge, U. S. District Court.

Filed Sept. 24, 1952. Alton L. Curtis, Clerk.

In United States District Court

Notice of Appeal—Filed September 25, 1952

Notice is hereby given that B. Clinton Watson and Mrs. Ruth S. Watson, complainants in the above numbered and entitled cause, hereby appeal to the Court of Appeals of the United States for the Fifth Circuit from the judgment rendered herein in favor of defendants, Employers Liability Assurance Corporation, Ltd., Gillette Safety Razor Company and the Gillette Company, on September 24, 1952.

Shreveport, Louisiana, this 25 day of September, 1952.

(Sgd.) Luther S. Montgomery, Cleve Burton, [fols. 50-52] Richard H. Switzer, 1305 Slattery Building, Shreveport, Louisiana, Attorneys for Complainants.

Certificate of Service—(Omitted in Printing)

[File endorsement omitted.]

Bond on appeal for $250.00, filed September 25, 1952—omitted in printing.

[fol. 53] IN UNITED STATES DISTRICT COURT

DESIGNATION OF CONTENTS OF RECORD ON APPEAL—Filed September 25, 1952

B. Clinton Watson and Mrs. Ruth S. Watson having appealed to the United States Court of Appeals, Fifth Circuit, from the judgment dismissing their suit against the defendants herein signed September 24th, 1952, hereby designate the following to constitute the record on appeal:

1. Original complaint;
2. Petition for removal;
3. First Supplemental and amended complaint;
4. Objection to allowance of supplemental and amended complaint and alternative motion to drop Gillette Safety Razor Company as defendant, filed by Employers Liability Assurance Corporation, Ltd.;
5. Motion to dismiss and plea of unconstitutionality filed by Employers Liability Assurance Corporation, Ltd.;
6. Motion to dismiss and alternative motion for a more definite statement filed by Employers Liability Assurance Corporation, Ltd.;

[fol. 54] 7. Motion to dismiss and alternative motion to quash service and citation filed by Gillette Company and Sheldon Flynn;

7A. All affidavits filed in connection with motions filed herein, originally filed in Civil Action 3697.

8. Second supplemental and amended complaint;
9. Motion to quash service of summons and attacking jurisdiction of the Court filed by the Gillette Company;
10. Objection to allowance of second supplemental and amended complaint and motion to drop the Gillette Company as defendant filed by Employers Liability Assurance Corporation, Ltd.;
11. Opinion of Court dismissing complainant's suit as against all defendants dated September 12, 1952;
12. Judgment of Court dated September 24, 1952;
13. Minutes of Court;
14. Notice of appeal;
15. Bond for costs on appeal;

16. Designation of contents of record;

17. Clerk's certificate.

[fol. 55] (Sgd.) Luther S. Montgomery, Cleve Burton, Richard H. Switzer, 1305 Slattery Building, Shreveport, Louisiana, Attorneys for Complainants.

Certificate of Service—(Omitted in Printing)

[File endorsement omitted.]

In United States District Court

Designation by Appellees of Additional Portion of Record on Appeal—Filed September 26, 1952

Employers Liability Assurance Corporation, Limited, Gillette Safety Razor Company and The Gillette Company, appellees, designate the following matters to be included in the record on appeal in addition to the matters designated by the appellants:

[fol. 56] 1. The entire remaining record in the above numbered and entitled cause including all exhibits, all stipulations of counsel and all minutes of the Court.

2. This designation.

(Sgd.) Benjamin C. King, Charles D. Egan, Attorneys for Appellees, 1500 Commercial National Bank Building, Shreveport, Louisiana.

[File endorsement omitted.]

[fol. 57] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 58] Argument and Submission—January 20, 1953—(Omitted in Printing)

[fol. 59] IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14316

B. CLINTON WATSON, et ux., Appellants,

versus

EMPLOYERS LIABILITY ASSURANCE CORPORATION, LIMITED, et al., Appellees

Appeal from the United States District Court for the Western District of Louisiana

Before Hutcheson, Chief Judge, and Strum and Rives, Circuit Judges

OPINION—February 27, 1953

HUTCHESON, Chief Judge:

This is the latest to be decided in a series of five tort actions [1] brought in the Western District of Louisiana against [fol. 60] insurers under the Louisiana Direct Action Statutes.[2]

Originally filed in the state court against appellee, the liability insurer of Gillette Safety Razor Company, under a policy [3] containing a "no action" clause valid in Massachusetts, where the policy was written, and in Illinois, where it was delivered, the suit was for damages sustained by plaintiff as a result of using "A New Toni Home Permanent" alleged to be a product manufactured and sold by a department of Gillette Safety Razor Co., the insured.

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[1] Bayard v. Traders & General, 99 Fed. Supp. 343, decided 8-18-51; Bish v. Employers, 102 Fed. Supp. 343, decided 1-28-52; Mobley v. K. C. Southern, et al., (unreported) decided 3-22-52; Mayo v. Zurich, 106 Fed. Supp. 580, decided 8-16-52; Watson v. Employers, 107 Fed. Supp. 494, decided 9-15-52.

[2] Acts 541 and 542 of 1950 of the State of Louisiana.

[3] Identical as to insurers and insured and otherwise, except as to dates, with, indeed a renewal of the policy in the Bish case, reported below, 102 Fed. Supp. 344.

The claim was that plaintiff, Mrs. Watson, though she had used the product precisely as directed, had been seriously and permanently injured as a result of so using it, and that defendant, Employers Liability Assurance Corporation, having issued a policy of liability insurance insuring and protecting its insured from liability for negligence, was liable to her for the damages she sued for.

The cause removed by the defendant into the federal court, there followed a welter of pleadings and affidavits, more fully described in the opinion of the district judge.[4] By and in these, plaintiff undertook, by supplemental and amended compiaints filed without leave obtained, to make an additional party, first, Gillette Safety Razor Co., and next, the Gillette Company.

[fol. 61] The defendant Employers opposed the filing of these pleadings and the making of these parties; and each of the Gillette companies, on jurisdictional grounds, resisted being brought into the suit.

In addition, Employers filed an extended motion to dismiss the action against it.[5]

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[4] Watson v. Employers Liability Assurance Co., 107 Fed. Supp. 494.

[5] Its grounds were: that under the terms of its policy it was not subject to a direct action; that to subject it to such action was to deny full faith and credit to the laws of Massachusetts and Illinois, where the policy was issued and delivered; that it would violate Secs. 1 & 10 of Art. 4 and Sec. 1, of the 14th Amendment to the Constitution of the United States, and Sec. 15 of Art. four of the Constitution of La. in that such action would, (a) impair the obligation of the defendant's contract with the Toni Company, (b) deny to defendant its right to have the Courts of Louisiana and the Federal Court sitting in Louisiana give full faith and credit to the Legislative Acts and jurisprudence of the States of Massachusetts and Illinois, (c) deprive the defendant of its property and rights without due process of law, and (d) deny to defendant equal protection of the law; that Act 55 of the Louisiana Legislative Session of 1930, as amended, Sec. 14.45 of Act 195 of the Louisiana Legislative Session of 1948, Sec. 655 of Title 22 of the Louisiana Revised Statutes of 1950, and Acts 541 and 542 of the Louisiana Legislative

On April 11, 1952, all pending motions submitted were taken under advisement on briefs, and on September 29th, for the reasons given in his opinion, the district judge entered judgment granting the motions.

Adjudging and decreeing that Acts 541 and 542 of the Louisiana Legislative Session of 1950 were unconstitutional, [fol. 62] null and void insofar as they attempted to invalidate or otherwise affect the "no action" clause of the policy executed and delivered by a foreign corporation in another state and valid where made, and that the action should in all respects be dismissed, the district judge entered an order dismissing it as to all the defendants.

Appealing from that judgment, the plaintiffs are here seeking its reversal. In support of their contention that the judgment may not stand, they press upon us, first, that the decision dismissing the cause as to Employers was erroneous because it is conceded, as it was in the *Bish* case, that Employers had filed a consent to be sued in a direct action required by Act 42 of 1950, as the condition of doing business in the state.

They press upon us, second, that if the dismissal was not

Session of 1950, under which this proceeding is brought, do not apply under the facts of this case, or if applicable, violate the provisions of the Federal and Louisiana Constitutions referred to in Art. 7 hereof insofar as the said Acts give, or purport to give complainants herein a direct cause of action against defendant under the facts set forth in this motion, as evidenced by the decision of this court in the case of Bish v. The Employers Liability Assurance Corp., Ltd., 102 Fed. Supp. 343; and that the complaint herein fails to state a claim upon which relief can be granted.

This was followed by a prayer: that the motion to dismiss and plea of unconstitutionality be sustained; and that Art. 55 of the Louisiana Legislative Session of 1930 as amended, Sec. 14.45 of Act 195 of the Louisiana Legislative Session of 1948, Sec. 655 of Title 22 of the Louisiana Revised Statutes of 1950, and Acts 541 and 542 of the Louisiana Legislative Session of 1950, each be declared unconstitutional, if applicable to this proceeding, in that they violate those sections of the Federal Constitution listed in Art. 7 of this motion.

erroneous as to Employers, it was as to the Gillette corporations because they had the right to substitute or bring the Gillettes in as new and additional parties, and that, upon the affidavits of record, they made out a showing as to the Gillette Company that it was doing business in the state and subject to be sued there.

We do not think so. As to the dismissal of the insurer, it is true that, as the extorted price of doing business in the state, it did file the written consent required by Art. 542 of 1950. We find ourselves, however, in complete accord with the views of the district judge that if the statute is construed as extending to and invalidating the "no action" provision of a policy written and delivered, as this one was, outside of the state, the statute represents an attempt to give [fol. 63] extra territorial effect to Louisiana laws and to subject to them the doing of business, and the business done, in other states. So construed, we are in no doubt that, as contended by Employers and as found by the district judge, it violates the defendant's constitutional rights.

This being so, it is clear that the decisions which settle it that consent to the deprivation of constitutional rights given as the extorted price of doing business in a state cannot prevent the assertion of those rights when they are challenged or sought to be denied, apply in full vigor here.

In complete accord with the reasons summed up by the district judge in his opinion[8] and with the more extended

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[8] These, as stated by him are:

"The issues involved in the motion to dismiss insurer (Employers) on the ground of the unconstitutionality of Act 541 of 1950 are the same as in Bish v. Employers' Liability Assurance Corp., Ltd., D. C., 102 F. Supp. 343, which was sustained. Nothing in the arguments has caused this court to change its views, but they have been, in effect, sustained in Fisher v. Home Indemnity Co., 5 Cir., 198 F. (2) 218, by the Court of Appeals for this Circuit in its decision handed down on June 30th last. The only difference is that the suit was filed here after the change made in the State law by the Acts 541 and 542 of 1950, LSA-R.S. 22:655, and note, 22:983, subd. E, applying to all policies of insurance whether

treatment accorded these reasons in the *Bish* and *Mayo* cases, *supra*, we shall not further extend this opinion by elaborating upon them. We shall, therefore, content our- [fol. 64] selves with referring with approval to those opinions and the authorities they cite, adding to them others as set out in the appended note.[7]

As to the question whether plaintiffs could or should be allowed to bring into the action, and continue it after dismissal of the insurer as against, either the razor company or the Gillette Company, the district judge was of the opinion, and in effect held, that the dismissal of Employers had effected a dismissal of the whole suit and that it could not be continued on the docket to bring in after removal an additional defendant or defendants not made parties in the state court.

He, therefore, dismissed the action completely and as to all defendants without at all determining or even considering the other questions arising as to the service of process and whether the defendants sought to be substituted are, as

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made or delivered in the State or elsewhere. The latter act compels an insurer, as a condition to doing business in this State, to consent in writing to be sued in a direct action alone upon any policy wherever written, in complete disregard of any "no action" clause. These matters were dealt with fully by this court in the case of Mayo v. Zurich General Accident & Liability Ins. Co., D. C., 106 Fed. Supp. 579. Both statutes were held to be unconstitutional insofar as they dealt with policies written and delivered outside the State of Louisiana, and that the State could not impose the compulsory consent either before or after the insurance company did business here. See also Bayard v. Traders & Gen. Ins. Co., D. C. 99 F. Supp. 343, and Bish v. Employers' Liability Assurance Corp., Ltd., D. C. 102 F. Supp. 343

Employers will therefore be dismissed from the case for the reasons stated in those decisions."

[7] Quaker City Cab Co. v. Penn., 277 U. S. 390; Terral v. Burke Construction Co., 257 U. S. 529; Frost v. R. R. Comm., 271 U. S. 583; Hanover Fire v. Carr, 272 U. S. 494; Security National v. Previtt, 202 U. S. 246; Power Mfg. Co. v. Saunders, 274 U. S. 490; Schwegman Bros. v. Board, 43 So. (2) 248.

claimed, doing business in Louisiana so as to give the court jurisdiction over them.

Appellee Employers points out: that the amended complaints by which plaintiffs sought to make the Gillette companies parties were filed without leave of the court; that no order has ever been issued allowing their filing; that no leave has been entered; that, in fact, the district judge sustained the objections of Employers as to the allowance of these complaints. It insists that the sole question for our decision is whether the trial judge abused his discretion in refusing to allow the amendment. It argues that not only [fol. 65] was there no abuse of discretion but that it would have been an abuse to allow their filing.

Insisting that neither Rule 21 nor Rule 25, Federal Rules of Civil Procedure, supports appellants' claim, it points out that Rule 25, providing for the substitution of parties in the case of death, incompetency, transfer of interests, etc., cannot possibly apply to this case, for what was attempted here was not the substitution of a party, but, in effect, the institution of a new suit against a new party.

As to Rule 21, which provides, "Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just", it quotes Moore's Federal Practice, 2nd Ed., Vol. 3, p. 2907:

> "It has been held that Rule 21 is not a substitution rule, but contemplates the retention of a party or parties when another party is added or dropped, and therefore that a sole party or defendant cannot be dropped and another added."

and cites cases in support.[8]

It, therefore, argues that the court was clearly correct in refusing to allow the supplemental and amended complaints filed by appellants and to permit them to continue with the

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[8] United States v. Swink, 41 Fed. Supp. 98; Schwartz v. Metropolitan Life Ins. Co., 2 FRD 167; Schwartz v. The Olympic, Inc., 74 Fed. Supp. 800; and Davis v. Cohen, 268 U. S. 68.

suit by the device of recreating it by bringing into it an entirely new party.

[fol. 66] We agree with the appellee that the permitting or refusal of amendments is a matter within the sound discretion of the court and that a rule denying an application to amend will not be disturbed on appeal unless there has been a clear abuse of discretion.

We agree, too, that there was no abuse in this case. Indeed, since the refusal to permit the filing did not in any manner prejudice plaintiffs in their right to sue the defendants separately if they were able to obtain jurisdiction of them, the district judge did not abuse, he used discretion in bringing this action to an end, leaving the controversial matters sought to be injected by the proffered amendments for another action if not another forum.

The judgment of dismissal was right. It is affirmed.

[fol. 67] IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14316

B. CLINTON WATSON, et ux.

versus

EMPLOYERS LIABILITY ASSURANCE CORPORATION, LIMITED, et al.

JUDGMENT—February 27th, 1953

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Louisiana, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of dismissal of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellants, B. Clinton Watson, and Another, and the surety on the appeal bond herein, William L. Switzer, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

[fol. 68] IN THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

[Title omitted]

PETITION FOR APPEAL—Filed March 7, 1953

The appellants respectfully show that a judgment was rendered in the above-numbered and entitled cause by the Court of Appeals on the 27th day of February, 1953, in the above-entitled cause, affirming the order of the United States District Court for the Western District of Louisiana, Shreveport Division, and that this cause is a proper cause to be reviewed by the Supreme Court of the United States on appeal.

Appellants file with this petition their assignment of errors, setting out separately and particularly each error asserted by them.

Appellants present with this petition a separate typewritten statement particularly describing the basis upon which it is contended that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment.

Wherefore, the appellants pray that an appeal be allowed and that the Clerk of the United States Court of Appeals for the Fifth Circuit be directed to send the record and proceedings in this cause, with all things concerning the same, to the Supreme Court of the United States, in order that the errors complained of may be reviewed, and if error be found, corrected according to the laws of the United States.

Dated this 7th day of March, 1953.

(S.) Val Irion, (S.) Richard H. Switzer, (S.) Cleve Burton, Attorneys for Appellants.

[fol. 69] IN THE UNITED STATES COURT OF APPEALS

[Title omitted]

ORDER ALLOWING APPEAL—March 7, 1953

It appearing to the Court that the appellants have filed their petition for appeal to the Supreme Court of the United States and filed therewith their assignment of errors and also their statement as to the jurisdiction of the Supreme Court of the United States as required by Rule 12 of the Supreme Court Rules, duly disclosing that the Supreme Court of the United States has jurisdiction upon appeal to review the judgment in question.

It is ordeerd that the appeal prayed for be and the same is hereby allowed to the Supreme Court of the United States from the judgment rendered on the 27th day of February, 1953, in the cause entitled B. Clinton Watson, et ux. vs. Employers Liability Assurance Corporation, Ltd., et al, and that appellants give an appeal bond with good and sufficient surety and conditioned according to law in the penal sum of $500.00.

Thus done and signed on this the 7th day of March 1953.

(S.) J. C. Hutcheson, Jr., United States Circuit Judge.

[fol. 70] IN THE UNITED STATES COURT OF APPEALS

[Title omitted]

ASSIGNMENT OF ERRORS

Plaintiffs and appellants file the following assignment of errors on which they will rely on their appeal to the Supreme Court of the United States from the judgment and decree of the Court of Appeals for the Fifth Circuit entered on the 27th day of February, 1953, in the case entitled B. Clinton Watson, et ux. vs. Employers Liability Assurance Corporation, Ltd., et al., viz:

The said Court erred:

1. In affirming the judgment of the United States District Court for the Western District of Louisiana, Shreveport

Division, which on the 29th day of September, 1952, dismissed the complaint of plaintiffs upon defendant's motion;

2. In not reversing the judgment of the District Court and in not requiring said defendant to answer the complaint;

3. In not decreeing and adjudging that both of Acts 541 and 542 of the Louisiana Statutes for the year 1950 are valid and applicable to defendant, Employers Liability Assurance Corporation, Ltd., and that said defendant is bound by the Louisiana Law authorizing a direct action against it for any tort committed by its assured in Louisiana to a Louisiana resident;

4. In holding that said Louisiana Statutes are invalid and unconstitutional and repugnant to the Constitution of the United States and that said Statutes violate "the defendant's constitutional rights";

5. In the rendition of the final judgment and decree filed and entered in this case on the 27th day of February, 1953.

(S.) Val Irion, (S.) Richard H. Switzer, (S.) Cleve Burton, Attorneys for Appellants.

[fols. 71-72] Bond on appeal for $500.00 approved and filed March 10, 1953, omitted in printing.

[fol. 73] Citation in usual form showing service on Benjamin C. King, omitted in printing.

[fols. 74-89] Statement directing attention to the provisions of paragraph 3, rule 12 of the Supreme Court, (omitted in printing).

[fol. 90] IN THE UNITED STATES COURT OF APPEALS

[Title omitted]

PRAECIPE FOR RECORD—Filed March 10, 1953

To the Clerk of the United States Court of Appeals, Fifth Circuit:

You are hereby requested to prepare a transcript of the record in this cause and to transmit it to the Clerk of the Supreme Court of the United States at Washington, D.C., duly certified and authenticated and within the time prescribed by the Rules of the Supreme Court of the United States, consisting of the following documents and portions of the record in this cause, which constitute the record on appeal to the Supreme Court of the United States:

1. The entire record on appeal to the Court of Appeals, Fifth Circuit, with the exception of the affidavits of Milton C. Trichel, Jr., Richard H. Switzer, Boone Gross, and Sheldon Flynn, and with the exception of all supplemental petitions and motions filed solely by Gillette Safety Razor Company and The Gillette Company and by Sheldon Flynn;

2. All pleadings filed in the Court of Appeals, Fifth Circuit, following the filing of the transcript of appeal;

3. Opinion of the Court of Appeals;

4. Minutes of the Court of Appeals;

5. Petition for Appeal;

6. Order allowing appeal;

[fol. 91] 7. Assignment of Errors;

8. Bond;

9. Citation on Appeal;

10. Notice on Appeal;

11. Jurisdictional Statement;

12. Praecipe for Record.

Dated this 7th day of March, 1953.

(Signed) Val Irion, Richard H. Switzer, Cleve Burton, Attorneys for Appellants.

[fol. 92] IN THE UNITED STATES COURT OF APPEALS

[Title omitted]

COUNTER-PRAECIPE—Filed March 13, 1953

To the Clerk of the United States Court of Appeals, Fifth Circuit:

In preparing the transcript of record in the above entitled cause on the appeal of plaintiffs-appellants, taken March 7, 1953, please include in said transcript the following:

1. Those portions of the entire record on appeal to the Court of Appeals, Fifth Circuit, which were not designated by plaintiffs-appellants in their praecipe for record dated March 7, 1953, including the affidavits of Milton C. Trichel, Jr., Richard H. Switzer, Boone Gross, and Sheldon Flynn, and all supplemental petitions and motions filed by Gillette Safety Razor Company and The Gillette Company and by Sheldon Flynn.

2. This counter-praecipe, together with proof of service thereof.

Dated this 12th day of March, 1953.

(Signed) Benjamin C. King, Charles D. Egan, Attorneys for Appellees.

[fol. 93] *Duly sworn to by Benjamin C. King. Jurat omitted in printing.*

[fol. 94] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 95] IN THE SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1953

No. —

B. CLINTON WATSON, et ux., Appellants,

vs.

EMPLOYERS LIABILITY ASSURANCE CORPORATION, LTD., et al., Appellee

STATEMENT OF POINTS AND DESIGNATION OF RECORD—Filed March 27, 1953

Pursuant to Rule 13, Paragraph 9, of the Revised Rules of this Court, Appellants state that they intend to rely upon all the points in their Assignment of Errors.

Appellants deem the entire record, as filed in the above entitled cause, necessary for consideration of the points relied upon.

Dated this 25th day of March, 1953.

Val Irion, Richard H. Switzer, Cleve Burton, Attorneys for Appellants.

[fol. 96-97] Proof of service omitted in printing.

[fol. 98] [File endorsement omitted.]

[fols. 99-100] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1953

No. 29

[Title omitted]

ORDER POSTPONING JURISDICTION—May 3, 1954

Appeal from and petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit

The statement of jurisdiction in this case having been submitted and considered by the Court, further considera-

tion of the question of the jurisdiction of this Court in this case on appeal is postponed to the hearing of the case on the merits. The petition for writ of certiorari is granted.

Mr. Justice Jackson took no part in the consideration or decision of this question.

[fol. 101] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1953

ORDER ALLOWING CERTIORARI—Filed May 3, 1954

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration or decision of this application.

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GENERAL—AUTOMOBILE LIABILITY POLICY

(COMPREHENSIVE FORM)

The EMPLOYERS'

LIABILITY ASSURANCE CORPORATION, LIMITED

DECLARATIONS

The insurance afforded is only with respect to such and so many of the following coverages as are indicated by specific premium charge or charges. The limit of the company's liability against each such coverage shall be as stated herein, subject to all the terms of this policy having reference thereto.

Item 1. Name of Insured: The Toni Company, A Division of the Gillette Safety Razor Company &/Or The Bobbi Company &/or Associated &/or Affiliated &/or Subsidiary Companies

Address (No., street, town, county, state): 456 Merchandise Mart, Chicago, Ill. 1200

The business of the named insured is

LOCATIONS OF ALL PREMISES OWNED, RENTED OR CONTROLLED BY NAMED INSURED	INTEREST OF NAMED INSURED IN SUCH PREMISES (Owner, General Lessee, Tenant)	PART OCCUPIED BY NAMED INSURED
332 Rosabel St., b/a 281-299 East 4th Street St. Paul, Minn.	Tenant	B-1-2-3-5 Floor
456 Merchandise Mart, Chicago, Ill.	Tenant	4th Floor

Item 2. Policy Period: 1 year From July 1, 1951 to July 1, 1952 12:01 A. M., standard time at the address of the named insured as stated herein.

Item 3. Coverages	Limits of Liability		Advance Premiums
Coverage A—Bodily Injury Liability—Automobile	$	each person	
	$	each accident	$
Coverage B—Bodily Injury Liability—Except Automobile	$	each person	
	$	each accident	$ 35,000.00
See End. Attached for Products	$	aggregate products	
Coverage C—Property Damage Liability—Automobile	$	each accident	$
Coverage D—Property Damage Liability—Except Automobile	$	each accident	
	$	aggregate operations	
	$	aggregate protective	$
	$	aggregate products	
	$	aggregate contractual	
		Total Advance Premium	$ 35,000.00

For three year policy, the Estimated Premium is _____

Payable $_____ in advance $_____ on first anniversary $_____ on second anniversary.

Item 4. The declarations are completed on attached schedules designated

No Exceptions

Item 5. (a) The schedules disclose all hazards insured hereunder known to exist at the effective date of this policy; (b) the schedules contain a complete list of all automobiles and trailers owned by the named insured at the effective date of this policy and the purposes of use thereof; (c) the schedules contain a complete list of all persons within the definition of Class 1 persons, at the effective date of this policy; (d) during the past year no insurer has canceled any similar insurance issued to the named insured; *Exception, if any, to (a), (b), (c) or (d):*

No exceptions

COUNTERSIGNED AT Boston, Mass.

ON May 23, 1952

_____ Authorized Agent.

No. 3700 - Civil - S.

CERTIFICATION

No. 3700 Civil

This is to certify that the attached is an exact copy of Policy No. C.L. 8523600, issued by The Employers' Liability Assurance Corporation, Limited, to The Toni Company, a Division of the Gillette Safety Razor Company and/or The Bobbi Company and/or Associated and/or Affiliated and/or Subsidiary Companies, 456 Merchandise Mart, Chicago, Ill.

The Employers' Liability Assurance Corporation, Limited

[signature]

May 27, 1952

Deputy Manager

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This endorsement is effective July 1, 1951 for attachment to Policy No. CI 8523600

issued to The Toni Company, etal

by The Employers' Liability Assurance Corp., Ltd.
(Name of Insurance Company)

In consideration of the deposit premium at which this Policy is written, it is understood and agreed that the Assured will, at the end of each period of three months from the date of the Policy, furnish the Corporation with a written statement showing the actual amount of remuneration earned by employees during that period and will within ten days after the expiration of each such period, pay to the Corporation a premium computed at the rate or rates specified in the schedule of the Policy for each One Hundred Dollars ($100.00) of such remuneration.

It is further understood and agreed that the deposit premium under this Policy shall be applied against the audit for the final period.

This Policy is hereby amended as herein specifically stated but not otherwise.

Countersigned _____
(Authorized Representative)

G3361 Deposit Premium Endorsement
Printed in U. S. A.

1b

(3) the word "cost" means the total cost of all operations performed for the named insured during the policy period by independent contractors on each separate project, including materials used or delivered for use, except maintenance or ordinary alterations and repairs on premises owned or rented by the named insured;

4) the word "sales" means the gross amount of money charged by the named insured or by others trading under his name for all goods and products sold or distributed during the policy period, and charged during the policy period for installation, servicing or repair, and includes taxes, other than taxes which the named insured and such others collect as a separate item and remit directly to a governmental division;

5) the words "cost of hire" mean the amount incurred for hired automobiles, including remuneration of the named insured's chauffeurs employed in the operation of such automobiles;

(6) the words "Class 1 persons" mean the following persons, provided their usual duties in the business of the named insured include the use of non-owned automobiles: (a) all employees, including officers, of the named insured compensated for the use of such automobiles by salary, commission, terms of employment, or specific operating allowance of any sort; (b) all direct agents and representatives of the named insured;

(7) the words "Class 2 employees" mean all employees, including officers, of the named insured, not included in Class 1 persons.

The named insured shall maintain for each hazard records of the information necessary for premium computation on the basis stated in the declarations, and shall send copies of such records to the company at the end of the policy period and at such times during the policy period as the company may direct.

2. **Inspection and Audit.** The company shall be permitted to inspect the insured premises, operations, automobiles and elevators and to examine and audit the insured's books and records at any time during the policy period and any extension thereof and within three years after the final termination of this policy, as far as they relate to the premium bases or the subject matter of this insurance.

3. **Definitions. (a) Contract.** The word "contract" means a warranty of goods or products or, if in writing, a lease of premises, easement agreement, agreement required by municipal ordinance, sidetrack agreement, or elevator or escalator maintenance agreement.

(b) Automobile. Except where stated to the contrary, the word "automobile" means a land motor vehicle or trailer as follows:

4. **Limits of Liability. Coverages A and B.** The limit of bodily injury liability stated in the declarations as applicable to "each person" is the limit of the company's liability for all damages, including damages for care and loss of services, arising out of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by one person in any one accident; the limit of such liability stated in the declarations as applicable to "each accident" is, subject to the above provision respecting each person, the total limit of the company's liability for all damages, including damages for care and loss of services, arising out of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by two or more persons in any one accident.

5. **Limits of Liability—Products. Coverages B and D.** The limits of bodily injury liability and property damage liability stated in the declarations as "aggregate products" are respectively the total limits of the company's liability for all damages arising out of the products hazard. All such damages arising out of one prepared or acquired lot of goods or products shall be considered as arising out of one accident.

6. **Limits of Liability. Coverage D.** The limit of property damage liability stated in the declarations as "aggregate operations" is the total limit of the company's liability for all damages arising out of injury to or destruction of property, including the loss of use thereof, caused by the ownership, maintenance or use of premises or operations rated upon a remuneration premium basis or by contractors' equipment rated on a receipts premium basis.

The limit of property damage liability stated in the declarations as "aggregate protective" is the total limit of the company's liability for all damages arising out of injury to or destruction of property, including the loss of use thereof, caused by operations performed for the named insured by independent contractors or omissions or supervisory acts of the insured in connection therewith, except maintenance or ordinary alterations and repairs on premises owned or rented by the named insured.

The limit of property damage liability stated in the declarations as "aggregate contractual" is the total limit of the company's liability for all damages arising out of injury to or destruction of property, including the loss of use thereof, with respect to each contract.

These limits apply separately to each project with respect to operations being performed away from premises owned or rented by the named insured.

7. **Limits of Liability.** The inclusion herein of more than one insured shall not operate to increase the limits of the company's liability.

(1) **Owned Automobile**—an automobile owned by the named insured;

(2) **Hired Automobile**—an automobile used under contract in behalf of, or loaned to, the named insured provided such automobile is not owned by or registered in the name of (a) the named insured or (b) an executive officer thereof or (c) an employee or agent of the named insured who is granted an operating allowance of any sort for the use of such automobile;

(3) **Non-Owned Automobile**—any other automobile.

The following described equipment shall not be deemed an automobile except while towed by or carried on a motor vehicle not so described: any crawler-type tractor, farm implement, ditch or trench digger, power crane or shovel, grader, scraper, roller, well drilling machinery, asphalt spreader, concrete mixer, mixing and finishing equipment for highway work, other than a concrete mixer of the mix-in-transit type, and, if not subject to motor vehicle registration, any equipment used principally on premises owned by or rented to the named insured, farm tractor or trailer.

(c) **Semitrailer.** The word "trailer" includes semitrailer.

(d) **Two or More Automobiles.** The terms of this policy apply separately to each automobile insured hereunder, but a motor vehicle and a trailer or trailers attached thereto shall be held to be one automobile as respects limits of liability.

(e) **Purposes of Use.** The term "pleasure and business" is defined as personal, pleasure, family and business use. The term "commercial" is defined as use principally in the business occupation of the named insured as stated in item 1, including occasional use for personal, pleasure, family and other business purposes. Use of an automobile includes the loading and unloading thereof.

(f) **Products Hazard.** The term "products hazard" means

(1) the handling or use of, the existence of any condition in or a warranty of goods or products manufactured, sold, handled or distributed by the named insured, other than equipment rented to or located for use of others but not sold, if the accident occurs after the insured has relinquished possession thereof to others and away from premises owned, rented or controlled by the insured or on premises for which the classification stated in division (a) of the declarations or in the company's manual excludes any part of the foregoing;

(2) operations, if the accident occurs after such operations have been completed or abandoned at the place of occurrence thereof and away from premises owned, rented or controlled by the insured, except (a) pick-up and delivery, (b) the existence of tools, uninstalled equipment and abandoned or unused materials and (c) operations for which the classification stated in division (a) of the declarations or in the company's manual specifically includes completed operations; provided, operations shall not be deemed incomplete because improperly or defectively performed or because further operations may be required pursuant to a service or maintenance agreement.

(g) **Assault and Battery.** Assault and battery shall be deemed an accident unless committed by or at the direction of the insured.

8. **Financial Responsibility Laws. Coverages A and C.** Such insurance as is afforded by this policy for bodily injury liability or property damage liability shall comply with the provisions of the motor vehicle financial responsibility law of any state or province which shall be applicable with respect to any such liability arising out of the ownership, maintenance or use during the policy period of any automobile insured hereunder, to the extent of the coverage and limits of liability required by such law, but in no event in excess of the limits of liability stated in this policy. The insured agrees to reimburse the company for any payment made by the company which it would not have been obligated to make under the terms of this policy except for the agreement contained in this paragraph.

9. **Notice of Accident.** When an accident occurs written notice shall be given by or on behalf of the insured to the company or any of its authorized agents as soon as practicable. Such notice shall contain particulars sufficient to identify the insured and also reasonably obtainable information respecting the time, place and circumstances of the accident, the names and addresses of the injured and of available witnesses.

10. **Notice of Claim or Suit.** If claim is made or suit is brought against the insured, the insured shall immediately forward to the company every demand, notice, summons or other process received by him or his representative.

11. **Assistance and Cooperation of the Insured.** The insured shall cooperate with the company and, upon the company's request, shall attend hearings and trials and shall assist in effecting settlements, securing and giving evidence, obtaining the attendance of witnesses and in the conduct of suits. The insured shall not, except at his own cost, voluntarily make any payment, assume any obligation or incur any expense other than for such immediate medical and surgical relief to others as shall be imperative at the time of accident.

12. **Action Against Company.** No action shall lie against the company unless, as a condition precedent thereto, the insured shall have fully complied with all the terms of this policy, nor until the amount of the insured's obligation to pay shall have been finally determined either by judgment against the insured after actual trial or by written agreement of the insured, the claimant and the company.

Any person or organization or the legal representative thereof who has secured such judgment or written agreement shall thereafter be entitled to recover under this policy to the extent of the insurance afforded by this policy. Nothing contained in this policy shall give any person or organization any right to join the company as a co-defendant in any action against the insured to determine the insured's liability.

Bankruptcy or insolvency of the insured or of the insured's estate shall not relieve the company of any of its obligations hereunder.

13. **Other Insurance.** If the insured has other insurance against a loss covered by this policy the company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability stated in the declarations bears to the total applicable limit of liability of all valid and collectible insurance against such loss; provided, however, the insurance under this policy with respect to loss arising out of the use of any non-owned automobile shall be excess insurance over any other valid and collectible insurance available to the insured, either as an insured under a policy applicable with respect to such automobile or otherwise.

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It is agreed that, subject to the following provisions, the Company will pay the named Insured for any loss of or damage to

(a) any elevator described in the schedule of this endorsement; or,

(b) any other property owned, rented, occupied or used by the named Insured

(hereinafter called loss) arising out of the ownership, operation or use of said elevator and caused by collision of said elevator or anything carried thereon, with another object.

The insurance afforded by this endorsement does not apply to any loss or damage:

A. due directly or indirectly to fire, lightning, inundation, tornado or cyclone; nor shall the Company be liable for repairs or replacements due to wear or depreciation;

B. due directly or indirectly to the making of additions to, alterations in or the extraordinary repair of any elevator, or due to the operation or use of any elevator while such additions, alterations or repairs are in progress, unless a written permit describing the work to be undertaken is granted by the Company;

C. arising out of liability assumed by the Insured under any contract or agreement;

D. to any electrical machine by reason of breaking, burning out or disruption thereof;

E. due directly to the breaking, burning out or disrupting of any electrical machine not located in the elevator car;

F. to any property in the care, custody or control of the Insured other than property owned, rented, occupied or used by the Insured;

G. arising from loss of use of

(1) property, or (2) elevators.

Limit of Liability $ **each accident**

SCHEDULE

Location of Elevators	Location on Premises	Type	Purpose of Use	Number on Premises	Number Insured	Rates Per Elevator	Premium

Total Premium $

This endorsement is effective July 1, 1951

This policy is amended as herein specifically stated but not otherwise.

For attachment to Policy No CL 8523600 issued to The Tool Company, etal

by The Employers' Liability Assurance Corp., Ltd.

(Name of Insurance Company)

Countersigned: _____

(Authorized Representative)

G2923.1 Elevator Collision Endorsement

Printed in U.S.A.

PROVISIONS

1. **Policy Terms.** All terms of the policy not inconsistent with the terms of this endorsement, apply to the insurance afforded by this endorsement.

2. **Endorsement Period.** This endorsement applies only to losses sustained during the effective period of this endorsement.

3. **Definition.** The word "elevator" wherever used in this endorsement shall mean the elevator cars and the parts of any machinery or appliances necessary to the use, maintenance or operation thereof.

4. **Notice of Loss.** In the event of loss, the named Insured shall give notice in writing thereof as soon as practicable to the Company or any of its authorized agents.

5. **Inspection.** The Company shall have reasonable time and opportunity to examine the damaged property of the Insured before replacement or repairs are undertaken or physical evidence of the damage removed, but the Insured shall not be prejudiced hereunder by any act on his part or in his behalf undertaken for the protection or salvage of the damaged property.

6. **Proof of Loss.** Within sixty days after the occurrence of loss unless such time is extended in writing by the Company, proof of loss is to be filed with the Company in the form of a sworn statement of the named Insured setting forth the interest of the named Insured and of all others in the property affected, any encumbrance thereon, the actual cash value thereof at time of loss, the amount, place, time and cause of such loss, and the description and amounts of all other insurance covering such property.

7. **Payment of Loss.** Action Against Company. The amount of loss or reimbursement for which the Company is liable shall not be payable nor shall action lie against the Company upon any claim for loss or reimbursement hereunder until thirty (30) days after proof of loss is filed and the amount of loss is determined as herein provided, nor unless the named Insured shall otherwise have complied with all the terms and conditions of this policy.

8. **Appraisal; Waiver.** If the Insured and the Company fail to agree as to the amount of loss, each shall, on the written demand of either, made within sixty (60) days after receipt of proof of loss by the Company, select a competent and disinterested appraiser; and the appraisal shall be made at a reasonable time and place. The appraisers shall first select a competent and disinterested umpire, and failing for fifteen (15) days to agree upon such umpire, then, on the request of the Insured or the Company, such umpire shall be selected by a judge of a court of record in the county and state in which appraisal is pending. The appraisers shall then appraise the loss, stating separately the actual cash value at the time of loss and the amount of loss, and failing to agree shall submit their difference to the umpire. An award in writing of any two shall determine the amount of loss.

The Insured and the Company shall each pay his or its chosen appraiser and shall bear equally the other expenses of the appraisal and umpire.

The Company shall not be held to have waived any of the terms of this policy by any requirements, act or proceeding on its part relating to the appraisal or to any examination provided for in this policy.

9. **Limits of Liability; No Abandonment.** The Company's liability for loss shall not exceed the actual cash value of the insured property at the time of loss nor what it would then cost to repair or replace either the insured property or any part thereof with other of like kind or quality, with proper deduction for depreciation from any cause and shall in no event exceed the limits of liability stated herein.

10. **Automatic Reinstatement.** When the elevator is damaged, whether or not such damage is covered under this policy, the liability of the Company shall be reduced by the amount of such damage until repairs have been completed, but shall then attach as originally written without additional premium.

THE EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LIMITED

(A Stock Insurance Company herein called the Company)

Agrees with the insured, named in the declarations made a part hereof, in consideration of the payment of the premium and in reliance upon the statements in the declarations and subject to the limits of liability, exclusions, conditions and other terms of this policy:

INSURING AGREEMENTS

I. **Coverage A—Bodily Injury Liability—Automobile.**

To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by any person, caused by accident and arising out of the ownership, maintenance or use of any automobile.

Coverage B—Bodily Injury Liability—Except Automobile.

To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury, sickness or disease, including death at any time resulting therefrom, sustained by any person and caused by accident.

Coverage C—Property Damage Liability—Automobile.

To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of injury to or destruction of property, including the loss of use thereof, caused by accident and arising out of the ownership, maintenance or use of any automobile.

Coverage D—Property Damage Liability—Except Automobile.

To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of injury to or destruction of property, including the loss of use thereof, caused by accident.

II. **Defense, Settlement, Supplementary Payments.**

As respects the insurance afforded by the other terms of this policy the company shall:

(a) defend any suit against the insured alleging such injury, sickness, disease or destruction and seeking damages on account thereof, even if such suit is groundless, false or fraudulent; but the company may make such investigation, negotiation and settlement of any claim or suit as it deems expedient;

(b) pay all premiums on bonds to release attachments for an amount not in excess of the applicable limit of liability of this policy, all premiums on appeal bonds required in any such defended suit, the cost of bail bonds required of the insured in the event of automobile accident or automobile traffic law violation during the policy period, not to exceed the usual charges of surety companies nor $100 per bail bond, but without any obligation to apply for or furnish any such bonds;

(c) pay all expenses incurred by the company, all costs taxed against the insured in any such suit and all interest accruing after entry of judgment until the company has paid, tendered or deposited in court such part of such judgment as does not exceed the limit of the company's liability thereon;

(d) pay expenses incurred by the insured for such immediate medical and surgical relief to others as shall be imperative at the time of the accident;

(e) reimburse the insured for all reasonable expenses, other than loss of earnings, incurred at the company's request.

The amounts incurred under this insuring agreement, except settlements of claims and suits, are payable by the company in addition to the applicable limit of liability of this policy.

III. **Definition of "Insured."**

The unqualified word "insured" includes the named insured and also includes (1) under coverages B and D, any partner, executive officer, director or stockholder thereof while acting within the scope of his duties as such, except with respect to the ownership, maintenance or use of automobiles while away from premises owned, rented or controlled by the named insured or the ways immediately adjoining, and (2) under coverages A and C, any person while using an owned automobile or a hired automobile and any person or organization legally responsible for the use thereof, provided the actual use of the automobile is by the named insured or with his permission, and any executive officer of the named insured with respect to the use of a non-owned automobile in the business of the named insured. The insurance with respect to any person or organization other than the named insured does not apply under division (2) of this insuring agreement:

(a) with respect to an automobile while used with any trailer owned or hired by the insured and not covered by like insurance in the company; or with respect to a trailer while used with any automobile owned or hired by the insured and not covered by like insurance in the company;

(b) to any person or organization, or to any agent or employee thereof, operating an automobile repair shop, public garage, sales agency, service station or public parking place, with respect to any accident arising out of the operation thereof;

(c) to any employee with respect to injury to or sickness, disease or death of another employee of the same employer injured in the course of such employment in an accident arising out of the maintenance or use of an automobile in the business of such employer;

(d) with respect to any hired automobile, to the owner thereof or any employee of such owner;

(e) with respect to any non-owned automobile, to any executive officer if such automobile is owned by him or a member of his household.

IV. **Policy Period, Territory.**

This policy applies only to accidents which occur during the policy period within the United States of America, its territories or possessions, Canada or Newfoundland. With respect to automobiles this policy also applies to accidents which occur during the policy period while the automobile is being transported between ports thereof.

EXCLUSIONS

This policy does not apply:

(a) to liability assumed by the insured under any contract or agreement except under coverages B and D, a contract as defined herein;

(b) under Coverages B and D, except with respect to operations performed by independent contractors, to watercraft while away from premises owned, rented or controlled by the named insured, automobiles while away from such premises or the ways immediately adjoining, or aircraft, or the loading or unloading thereof;

(c) under Coverages A and B, except with respect to liability assumed under contract covered by this policy, to any obligation for which the insured or any company as his insurer may be held liable under any workmen's compensation law;

(d) under Coverage A, to bodily injury to or sickness, disease or death of any employee of the insured while engaged in the employment, other than domestic, of the insured or in domestic employment if benefits therefor are either payable or required to be provided under any workmen's compensation law;

(e) under Coverage B, except with respect to liability assumed under contract covered by this policy, to bodily injury to or sickness, disease or death of any employee of the insured while engaged in the employment of the insured;

(f) under Coverage C, to injury to or destruction of property owned by, rented to, in charge of or transported by the insured;

(g) under Coverage D, to injury to or destruction of (1) property owned, occupied or used by or rented to the insured, or (2) except with respect to liability assumed under sidetrack agreements and the use of elevators or escalators, property in the care, custody or control of the insured, or (3) any goods or products manufactured, sold, handled or distributed or premises alienated by the named insured, or work completed by or for the named insured, out of which the accident arises;

(h) under Coverage D, except with respect to liability assumed under contract covered by this policy and except in so far as this exclusion is stated in the declarations to be inapplicable, to (1) the discharge, leakage or overflow of water or steam from plumbing, heating, refrigerating or air-conditioning systems, elevator tanks or cylinders, standpipes for fire hose, or industrial or domestic appliances, or any substance from automatic sprinkler systems, (2) the collapse or fall of tanks or the component parts or supports thereof which form a part of automatic sprinkler systems, or (3) rain or snow admitted directly to the building interior through defective roofs, leaders or spouting, or open or defective doors, windows, skylights, transoms or ventilators, in so far as any of these occur on or from premises owned or rented by the named insured and injure or destroy buildings or contents thereof.

CONDITIONS

The conditions, except Conditions 4, 5, 6 and 8, apply to all coverages noted thereunder. **Conditions 4, 5, 6 and 8 apply only to the coverage or coverages noted thereunder.**

1. **Premium.** The premium bases and rates for the hazards described in the declarations are stated therein. Premium bases and rates for hazards not so described are those applicable in accordance with the manuals in use by the company.
An average percentage reduction is to be computed in accordance with the following table and applied to the premiums for all owned automobiles.

Premium Reduction Table		
Number of Licensed Owned Automobiles, Exclusive of Trailers, Insured Hereunder (computed pro rata if less than the policy period)		Percentage Reduction
1st	5	0%
Next	15	10%
Next	30	15%
Next	50	20%
All over	100	25%

The premium stated in the declarations is an estimated premium only. Upon termination of this policy, the earned premium shall be computed in accordance with the company's rules, rates, rating plans, premiums and minimum premiums applicable to this insurance. If the earned premium thus computed exceeds the estimated advance premium paid, the named insured shall pay the excess to the company; if less, the company shall return to the named insured the unearned portion paid by such insured.

When used as a premium basis:

(1) the word "remuneration" means (a) the entire remuneration earned during the policy period by all employees of the named insured, other than drivers of teams or automobiles and aircraft pilots and co-pilots, subject to any overtime earnings or limitation of remuneration rule applicable in accordance with the manuals in use by the company, and subject with respect to each executive officer to a maximum and a minimum of $100 and $30 per week, and (b) the remuneration of each proprietor at a fixed amount of $2,000 per annum;

(2) the word "receipts" means the gross amount of money charged by the named insured for such operations by the named insured or by others during the policy period as are rated on a receipts basis, and includes taxes, other than taxes which the named insured collects as a separate item and remits directly to a governmental division;

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AUTOMOBILE
(Liability)

AL 6320
(Ed. 12-47)

Form A324

AUTOMOBILE FLEET PLAN

(Fleet Automatic)

This endorsement, effective July 1, 1951 (12:01 A.M., standard time), forms a part of policy No. CL 8523600

issued to The Toni Company, etal

by The Employers' Liability Assurance Corp., Ltd.

SCHEDULE

The insurance afforded is only with respect to such and so many of the following coverages as are indicated by specific premium charge or charges:

Town or City and State in Which the Automobile Will Be Principally Garaged	Year of Model	Trade Name	Body Type and Model; Truck Size; Tank Gal. Capacity; or Bus Seating Capacity	Serial No. Motor No.	Purposes of Use	Advance Premiums		
						Bodily Injury Liability	Property Damage Liability	Medical Payments
					Total Advance Premiums	$	$	$

It is agreed that such insurance as is afforded by the policy for Bodily Injury Liability, for Property Damage Liability and for Medical Payments applies with respect to owned automobiles subject to the following provisions:

1. **Definitions.** The words "owned automobile" shall mean a land motor vehicle, trailer or semitrailer owned by the named insured, provided the following described equipment shall not be deemed an automobile except while towed by or carried on a motor vehicle not so described: any crawler-type tractor, farm implement, ditch or trench digger, power crane or shovel, grader, scraper, roller, well drilling machinery, asphalt spreader, concrete mixer, mixing and finishing equipment for highway work, other than a concrete mixer of the mix-in-transit type, and, if not subject to motor vehicle registration, any equipment used principally on premises owned by or rented to the named insured, farm tractor or trailer. The word "automobile" wherever used in the policy with respect to the insurance afforded under this endorsement, shall include "owned automobile."

2. **Application of Insurance.** The insurance applies to all licensed owned automobiles and to all owned trailers, including such automobiles and trailers acquired during the policy period, used for the purposes stated in the schedule forming a part hereof. The definitions in the policy of "commercial" and "pleasure and business" apply respectively to automobiles of the commercial or truck type and to automobiles of the private passenger type except as otherwise provided.

3. **Premium.** The premium basis for this insurance is per automobile. The premium stated in the declarations is an estimated premium only and, except where specifically stated to the contrary, the premium reduction percentage determined in accordance with the premium reduction table forming a part hereof, including on a pro rata basis each licensed owned automobile, exclusive of trailers, insured hereunder for less than the policy period, is applicable to the premium for each automobile insured hereunder. Upon termination of the policy, the earned premium shall be computed in accordance with the company's rules, rates, rating plans, premiums and minimum premiums applicable to this insurance. If the earned premium thus computed exceeds the estimated advance premium paid for this insurance, the named insured shall pay the excess to the company; if less, the company shall return to the named insured the unearned portion paid by such insured.

Premium Reduction Table	
Number of Licensed Owned Automobiles, Exclusive of Trailers	Percentage Reduction
1st 5	0%
Next 15	10%
Next 30	15%
Next 50	20%
All over 100	25%
An average percentage reduction applicable to the premiums for all owned automobiles insured hereunder is to be computed in accordance with this table.	

The named insured shall maintain records of the information necessary for premium computation on the basis stated in the schedule, and shall send copies of such records to the company at the end of the policy period and at such times during the policy period as the company may direct.

4. **Inspection and Audit.** The company shall be permitted to inspect the insured automobiles and to examine and audit the insured's books and records at any time during the policy period and any extension thereof and within three years after the final termination of the policy, as far as they relate to the premium basis or the subject matter of this insurance.

5. **Declarations.** The named insured declares that the schedule contains a complete list of all automobiles and trailers owned by him at the effective date of the policy and the purposes of use thereof, except as therein stated.

.....
Authorized Representative

DECLARATIONS — SCHEDULE _____
GENERAL LIABILITY General—Automobile Liability Policy (Comprehensive Form) No. **C. L.** 8523600

DESCRIPTION OF HAZARDS	CODE NO.	PREMIUM BASES	RATES COV. B	RATES COV. D	ADVANCE PREMIUMS COVERAGE B BODILY INJURY LIABILITY	ADVANCE PREMIUMS COVERAGE D PROPERTY DAMAGE LIABILITY
DIVISION a. PREMISES—OPERATIONS		(a) Area (b) Frontage (c) Estimated Annual Remuneration	(a) Per 100 Sq. Ft. Area (b) Per Lineal Ft. Frontage (c) Per $100 Remuneration			
Purposes of Use—Classification of Operations						
DIVISION b. ELEVATORS			ADVANCE PREMIUMS DIVISION a		$	$
Location on Premises—Purposes of Use		NUMBER INSURED	PER ELEVATOR			
DIVISION c. INDEPENDENT CONTRACTORS—LET OR SUBLET WORK			ADVANCE PREMIUMS DIVISION b		$	$
Description of Work to be Performed		COST	PER $100 OF COST			

DIVISION d. PRODUCTS—INCLUDING COMPLETED OPERATIONS		ADVANCE PREMIUMS DIVISION c	$	$
Description of Products	SALES	PER $1000 OF SALES		
See Endorsement Attached				
DIVISION e. CONTRACTUAL		ADVANCE PREMIUMS DIVISION d	$ 35,000.00	
Names of Parties, Date and Type of Agreement	NUMBER INSURED	PER CONTRACT		
		ADVANCE PREMIUMS DIVISION e	$	$
DIVISION f. SPECIAL COVERAGE PREMIUMS			$	$
		TOTAL ADVANCE PREMIUMS	$ 35,000.00	

G-4001-1 SCHED. PRINTED IN U. S. A.

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SHORT RATE CANCELATION TABLE

FOR TERM OF ONE YEAR

Days Policy in Force	Per Cent of One Year Premium	Days Policy in Force	Per Cent of One Year Premium
1	5	154-156	53
2	6	157-160	54
3-4	7	161-164	55
5-6	8	165-167	56
7-8	9	168-171	57
9-10	10	172-175	58
11-12	11	176-178	59
13-14	12	179-182 (6 mos.)	60
15-16	13	183-187	61
17-18	14	188-191	62
19-20	15	192-196	63
21-22	16	197-200	64
23-25	17	201-205	65
[illegible]	18	206-209	66
2 (1 mo.)	19	210-214 (7 mos.)	67
33-36	20	215-218	68
37-40	21	219-223	69
41-43	22	224-228	70
44-47	23	229-232	71
48-51	24	233-237	72
52-54	25	238-241	73
55-58	26	242-246 (8 mos.)	74
59-62 (2 mos.)	27	247-250	75
63-65	28	251-255	76
66-69	29	256-260	77
70-73	30	261-264	78
74-76	31	265-269	79
77-80	32	270-273 (9 mos.)	80
81-83	33	274-278	81
84-87	34	279-282	82
88-91 (3 mos.)	35	283-287	83
92-94	36	288-291	84
95-98	37	292-296	85
99-102	38	297-301	86
103-105	39	302-305 (10 mos.)	87
106-109	40	306-310	88
110-113	41	311-314	89
114-116	42	315-319	90
11[illegible]	43	320-323	91
12[illegible]4 (4 mos.)	44	324-328	92
125-127	45	329-332	93
128-131	46	333-337 (11 mos.)	94
132-135	47	338-342	95
136-138	48	343-346	96
139-142	49	347-351	97
143-146	50	352-355	98
147-149	51	356-360	99
150-153 (5 mos.)	52	361-365 (12 mos.)	100

FOR POLICIES WITH TERMS LESS THAN, OR GREATER THAN, 12 MONTHS:

A. **If policy has been in force for 12 months or less:** apply the standard short rate table for annual policies to the full annual premium determined as for a policy written for a term of one year

B. **If policy has been in force for more than 12 months:**

1. Determine full annual premium as for a policy written for a term of one year.
2. Deduct such premium from the full policy premium, and on the remainder calculate the pro rata earned premium on the basis of the ratio of the length of time beyond one year the policy has been in force to the length of time beyond one year for which the policy was originally written.
3. Add premium produced in accordance with items (1) and (2) to obtain earned premium during full period policy has been in force

GENERAL—AUTOMOBILE LIABILITY POLICY

(Comprehensive Form)

No. **C.L.** 8523600

Expires July 1, 1952

Premium $ 35,000.00

Insured The Toni Company, etal

Chicago, Ill.

The EMPLOYERS' LIABILITY ASSURANCE CORPORATION, LIMITED

RECEIVED
JUN 23 1954
OFFICE OF THE CLERK
SUPREME COURT, U. S.

EDWARD A. LARNER
United States Manager and Attorney
BOSTON, MASS.

Boit, Dalton & Church

E 4962-1

DECLARATIONS — SCHEDULE _____

AUTOMOBILE LIABILITY General—Automobile Liability Policy (Comprehensive Form) No. **C. L.** _____

DESCRIPTION OF HAZARDS			IN PURPOSES OF USE COLUMNS THE LETTER "C" MEANS COMMERCIAL AND THE LETTERS "P & B" MEAN PLEASURE AND BUSINESS, EACH AS DEFINED IN THE POLICY		ADVANCE PREMIUMS	
DIVISION 1 — OWNED AUTOMOBILES			**Premium Basis — Per Automobile**		COVERAGE A BODILY INJURY LIABILITY	COVERAGE C PROPERTY DAMAGE LIABILITY
TOWN, COUNTY AND STATE IN WHICH THE AUTOMOBILE WILL BE PRINCIPALLY GARAGED	TRADE NAME, BODY TYPE AND MODEL, TRUCK LOAD CAPACITY	YEAR OF MODEL	(M) MOTOR NUMBER (S) SERIAL NUMBER	PURPOSES OF USE		

DIVISION 2 — HIRED AUTOMOBILES		**Premium Basis — Cost of Hire**		ADVANCE PREMIUMS FOR DIVISION 1		$	$
TYPES HIRED	LOCATIONS WHERE AUTOMOBILES WILL BE PRINCIPALLY USED	PURPOSES OF USE	ESTIMATED COST OF HIRE	RATES PER $100 COST OF HIRE			
				COV. A	COV. C		

DIVISION 3 — NON-OWNED AUTOMOBILES	Premium Basis—Class 1 Persons and Class 3 Employees	ADVANCE PREMIUMS DIVISION 2	$	$
CLASS 1 PERSONS—NAME OF EACH	LOCATION OF HEADQUARTERS OF PERSONS NAMED HEREIN			

CLASS 2 EMPLOYEES ESTIMATED AVERAGE NUMBER	LOCATION OF HEADQUARTERS OF CLASS 2 EMPLOYEES	RATES PER EMPLOYEE COV. A	RATES PER EMPLOYEE COV. C		
				ADVANCE PREMIUMS DIVISION 3	$	$
DIVISION 4 — SPECIAL COVERAGE PREMIUMS — AUTOMOBILE				MINIMUM PREMIUM DIVISION 3	$	$
1. Independent Contractors (Automobile)						
2. Medical Payments Auto.—see endorsement						
3. Surcharge Minimum Premium: $_____ BI; $_____ PD				TOTAL ADVANCE PREMIUMS	$	$

The Employers' Liability Assurance Corporation, Limited

BOOK SCHEDULE ENDORSEMENT

For Use of Insured

Endorsement No 1
Face 1
Policy No CL 8523600

Insured The Toni Company, etal

Effective July 1, 1951

It is agreed that wherever used in this endorsement:

The term "incurred losses" shall mean both losses paid and losses unpaid, each as hereinafter defined;

The term "Losses Paid" shall mean the amounts actually paid under this Policy by the Company for settlement of claims, allocated claims expense and in satisfaction of judgements, including interest thereon, rendered against the insured in any civil proceedings by a court of competent jurisdiction;

The term "Losses unpaid" shall mean those reserves set up by the company as its best estimate of the probable amount to be paid under this Policy by the Company for settlement of claims, allocated claims expense and in satisfaction of judgements, including interest thereon, rendered against the insured in any civil proceedings by a court of competent jurisdiction;

The term "Allocated claims expense" shall mean the expenses incurred bythe Company in connection with the investigation, adjustment and trial of accidents, claims and suits which would not beincluded in the work ordinarily done by a claim department, thus including amounts actually paid by the Company: 1. To attorneys, doctors, experts, appraisers, photographers, printers, stenographers (Not on salary in emplоy of company) for services in connection with the investigation and settlement of claimsand the defense of legal proceedings as defined in this Policy. 2. for cost of release of attachment, removal and appeal bonds; and 3. For fees and expenses of witnesses

The Premium for this Policy shall be the sum of:

(a) The incurred losses, subject to a limit of $10,000. per accident plus actual allocated claims expenses; and

(b) That percentage of the incurred losses set forth in the table of factors opposite the applicable incurred loss figure as developed under section (A) Above; and

Date Issued _____

Agent or Broker _____ *Sub Agent or Sub Broker* _____

The Employers' Liability Assurance Corporation, Limited

BOOK SCHEDULE ENDORSEMENT

For Use of Insured

Endorsement No. 1

Page 2

Policy No. CL 8523600

Insured The Toni Company, etal

(c) The incurred losses under this Policy which are not included in section (a) Above.

The minimum premium for this Policy shall be $16,500.

Computation of Cost Plus Premium

As soon as practicable, the Companyshall determine the amount of incurred losses as of December 31, 1951 and shall make the initial computation of cost plus premium therefrom.

Corresponding computations shall be made on losses as of June 30, 1952, December 31, 1952, June 30, 1953, December 31, 1953, June 30, 1954, December 31, 1954 and June30, 1955.

The Computation made on losses as of June 30, 1955 shall constitute the final premium due and payable unless further computations are requested by the insured.

Payment of Premium

The named insured shall pay to the Company at inception date of the Policy a deposit premium of $35,000. which shall be retained until June 3 , 1953.

At the time of the i' 'tial computation of the Cost plus premium the named insured shall pay to the company the earned cost plus premium.

On each subsequent computation of cost plus premium, if the earned costplus premium is in excess of the prior cost plus premium the named insured shall pay the difference to the Company, if less, the company shall return the excess to the named Insured.

Agreed to by:_____

TITLE

*Date Issued*_____

*Agent or Broker*_____ *Sub-Agent or Sub-Broker*_____

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The Employers' Liability Assurance Corporation, Limited

BOOK SCHEDULE ENDORSEMENT

For Use of Insured

Endorsement No. 1

Page 3

Policy No. CL-8523600

Insured The Toni Company, etal

TABLE OF FACTORS

INCURRED LOSSES	FACTOR
Below $250	Minimum premium applies
$250 to $499	3,830.3%
$500 to $749	2,657.6%
$750 to $999	1,903.8%
$1,000 to $1,999	1,118.3%
$2,000 to $2,999	678.4%
$3,000 to $3,999	489.9%
$4,000 to $4,999	385.1%
$5,000 to $7,499	282.5%
$7,500 to $9,999	207.1%
$10,000 to $12,499	165.2%
$12,500 to $14,999	138.5%
$15,000 to $17,499	120.0%
$17,500 to $19,999	106.5%
$20,000 to $22,499	96.2%
$22,500 to $24,999	88.0%
$25,000 to $27,499	79.4%
$27,500 to $29,999	74.1%
$30,000 to $32,499	69.7%
$32,500 to $34,999	65.9%
$35,000 to $37,499	62.3%
$37,500 to $39,999	59.3%
$40,000 to $42,499	57.3%
$42,500 to $44,999	55.1%
$45,000 to $49,999	51.8%
$50,000 to $54,999	49.0%
$55,000 to $59,999	46.4%
$60,000 to $64,999	44.1%

Date Issued _____

Agent or Broker _____ *Sub-Agent or Sub-Broker* _____

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The Employers' Liability Assurance Corporation, Limited

BOOK SCHEDULE ENDORSEMENT

For Use of Insured

Endorsement No. 1
Page 4
Policy No. CI-3523600

Insured
The Toni Company, etal

TABLE OF FACTORS

CONTINUED

INCURRED LOSSES	FACTOR
$65,000 to $69,999	42.2%
$70,000 to $79,999	39.9%
$80,000 to $89,999	38.6%
$90,000 to $99,999	36.5%
$100,000 to $109,999	34.8%
$110,000 to $119,999	33.4%
$120,000 to $129,999	32.2%

Date Issued _____

Agent or Broker _____ *Sub-Agent or Sub-Broker* _____

14. **Subrogation.** In the event of any payment under this policy, the company shall be subrogated to all the insured's rights of recovery therefor against any person or organization and the insured shall execute and deliver instruments and papers and do whatever else is necessary to secure such rights. The insured shall do nothing after loss to prejudice such rights.

15. **Three Year Policy.** A policy period of three years is comprised of three consecutive annual periods. Rates for hazards described in divisions 1, 2 and 3 of the Description of Hazards are subject to amendment for the second and third annual periods in accordance with the company's rules and rating plans. Amended rates shall be stated by endorsement issued to form a part of the policy. Computation and adjustment of earned premium shall be made at the end of each annual period. Aggregate limits of liability as stated in this policy shall apply separately to each annual period in the same manner in which they would apply if the policy period were one year.

16. **Changes.** Notice to any agent or knowledge possessed by any agent or by any other person shall not effect a waiver or a change in any part of this policy or estop the company from asserting any right under the terms of this policy; nor shall the terms of this policy be waived or changed, except by endorsement issued to form a part of this policy, signed by a duly authorized representative of the company.

17. **Assignment.** Assignment of interest under this policy shall not bind the company until its consent is endorsed hereon; if, however, the named insured shall die or be adjudged bankrupt or insolvent within the policy period, this policy, unless canceled, shall, if written notice be given to the company within sixty days after the date of such death or adjudication, cover (1) the named insured's legal representative as the named insured, and (2) under Coverages A and C, subject otherwise to the provisions of Insuring Agreement III, any person having proper temporary custody of any owned automobile or hired automobile, as an insured, until the appointment and qualification of such legal representative but in no event for a period of more than sixty days after the date of such death or adjudication.

18. **Cancelation.** This policy may be canceled by the named insured by mailing to the company written notice stating when thereafter such cancelation shall be effective. This policy may be canceled by the company by mailing to the named insured at the address shown in this policy written notice stating when not less than five days thereafter such cancelation shall be effective. The mailing of notice as aforesaid shall be sufficient proof of notice and the effective date and hour of cancelation stated in the notice shall become the end of the policy period. Delivery of such written notice either by the named insured or by the company shall be equivalent to mailing.

    If the named insured cancels, earned premium shall be computed in accordance with the customary short rate table and procedure. If the company cancels, earned premium shall be computed pro rata. Premium adjustment may be made at the time cancelation is effected and, if not then made, shall be made as soon as practicable after cancelation becomes effective. The company's check or the check of its representative mailed or delivered as aforesaid shall be a sufficient tender of any refund of premium due to the named insured.

19. **Terms of Policy Conformed to Statute.** Terms of this policy which are in conflict with the statutes of the state wherein this policy is issued are hereby amended to conform to such statutes.

20. **Declarations.** By acceptance of this policy the named insured agrees that the statements in the declarations are his agreements and representations, that this policy is issued in reliance upon the truth of such representations and that this policy embodies all agreements existing between himself and the company or any of its agents relating to this insurance.

In Witness Whereof, The Employers' Liability Assurance Corporation, Limited, has caused this policy to be executed by its authorized Manager acting under power of attorney, and countersigned on the declarations page by a duly authorized agent of the company.

Edward A. Farmer

United States Manager and Attorney.